(8)

No. 99-116-CFY Title: Jeffrey Allan Fischer, Petitioner
v.
United States

Docketed: July 15, 1999 Court: United States Court of Appeals for the Eleventh Circuit

Entry	Date	Proceedings and Orders
	Jul 15 1999	Petition for writ of certiorari filed. (Response due September 15, 1999)
	Aug 10 1999	Order extending time to file response to petition until September 15, 1999.
	Sep 14 1999	Brief of respondent United States of America in opposition filed.
	Sep 29 1999	DISTRIBUTED. October 15, 1999
	Oct 25 1999	REDISTRIBUTED. October 29, 1999
	Nov 1 1999	Petition GRANTED. SET FOR ARGUMENT February 22, 2000. **********
	Dec 15 1999	Joint appendix filed.
	Dec 15 1999	Brief of petitioner Jeffrey A. Fischer filed.
	Dec 16 1999	Brief amicus curiae of National Association of Criminal Defense Lawyers filed.
	Jan 3 2000	Record filed.
	Jan 7 2000	CIRCULATED.
	Jan 19 2000	Brief of respondent United States filed.
	Feb 3 2000	Record filed.
	Feb 15 2000	Reply brief of petitioner Jeffrey A. Fischer filed.
	Feb 22 2000	ARGUED.
	Feb 23 2000	Record filed.

Supreme Court, U.S.
FILED

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No. _____

In The

Supreme Court of the United States

JEFFREY ALLAN FISCHER,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

1. Whether Medicare payments to a hospital for services provided to Medicare patients qualify as "benefits" to meet the jurisdictional requirements of Title 18 U.S.C. § 666 so as to federalize crimes of theft, embezzlement, and bribery involving the hospital?

CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

The undersigned counsel on behalf of Petitioner Jeffrey Allan Fischer, hereby certifies that to the best of his knowledge and belief, the following is an accurate listing of all persons and entities with an interest in the outcome of this case.

BAKER, DAVID A., United States Magistrate Judge

COLLAZO, CYNTHIA, Assistant United States Attorney.

CONWAY, ANNE C., United States District Judge

DIETRICH, DONALD P., United States Magistrate Judge

FISCHER, JEFFREY A., Defendant/Appellant

HORWITZ, MARK L., Attorney for Defendant/ Appellant, Jeffrey A. Fischer

PHIPPS, TAMRA, Assistant United States Attorney

QUALITY MEDICAL CONSULTANTS, INC.

RHODES, DAVID P., Assistant United States Attorney

WEST VOLUSIA HOSPITAL AUTHORITY

WILSON, CHARLES R., United States Attorney

This is a crime in which the victim is the West Volusia Hospital Authority.

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OPINION BELOW

The opinion of the United States Court of Appeals for the Eleventh Circuit that gives rise to this petition is *United States v. Fischer*, 168 F.3d 1273 (11th Cir. 1999). (*App.* 1). By order filed April 28, 1999, the Eleventh Circuit denied the Petition for Rehearing and Suggestion for Rehearing *En Banc*. (*App.* 16).

JURISDICTION

The district court imposed sentence on Fischer on October 25, 1996. Fischer timely appealed to the Eleventh Circuit, which affirmed in an opinion filed on March 4, 1999. On April 28, 1999, the Eleventh Circuit denied Fischer's timely-filed motion for rehearing and suggestion for rehearing *en banc*. Pursuant to Supreme Court Rule 13.1, this petition has been filed within 90 days of the denial of rehearing.

The jurisdiction of the court is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The constitutional and statutory provisions involved herein:

Title 18 U.S.C. § 666, Theft or bribery concerning programs receiving Federal Funds

(a) Whoever, if the circumstances described in subsection (b) of this sections exists –

(1) being an agent of an organization, or of a State, local, or Indian tribal government, or any agency thereof –

(A) embezzles, steals, obtains by fraud, or otherwise without authority knowingly coverts to the use of any person other than the rightful owner or intentionally misapplies, property that –

(i) is valued at $5,000 or more, and

(ii) is owned by, or is under the care, custody, or control of such organization, government, or agency; or

(B) corruptly solicits or demands for the benefit of any person, or accepts or agrees to accept, anything of value from any person, intending to be influenced or rewarded in connection with any business, transaction, or series of transactions of such organization, government, or agency involving anything of value of $5,000 or more; or

(2) corruptly gives, offers, or agrees to give anything of value to any person, with intent to influence or reward an agent of an organization or of a State, local or Indian tribal government, or any agency thereof, in connection with any business, transaction, or series of transactions of such organization, government, or agency involving anything of value of $5,000 or more;

shall be fined under this title, imprisoned not more than 10 years, or both.

(b) The circumstances referred to in subsection (a) of this section is that the organization, government, or agency receives, in any one year period, benefits in excess of $10,000 under a Federal program involving a grant, contract, subsidy, loan, guarantee, insurance, or other form of Federal assistance.

(c) This section does not apply to bona fide salary, wages, fees, or other compensation paid, or expenses paid or reimbursed, in the usual course of business.

(d) As used in this section –

(1) the term "agent" means a person authorized to act on behalf of another person or a government and, in the case of an organization or government, includes a servant or employee, and a partner, director, officer, manager, and representative;

(2) the term "government agency" means a subdivision of the executive, legislative, judicial, or other branch of government, including a department, independent establishment, commission, administration, authority, board, and bureau, and a corporation or other legal entity established, and subject to control, by a government or governments for the execution of a governmental or intergovernmental program;

(3) the term "local" means of or pertaining to a political subdivision within a State;

(4) the term "State" includes a State of the United States, the District of Columbia, and any commonwealth, territory, or possession of the United States; and

(5) the term "in any one-year period" means a continuous period that commences no earlier than twelve months before the commission of the offense

or that ends no later than twelve months after the commission of the offense. Such period my include time both before and after the commission of the offense.

STATEMENT OF THE CASE

Mr. Fischer was indicted by a federal grand jury in Orlando, Florida on December 7, 1995. (R1/1) A superseding indictment was filed on June 12, 1996 which added several money laundering counts. (R1/51)

The charges all stemmed from a loan made to Quality Medical Consultants, Inc. ("QMC") by the West Volusia Hospital Authority ("Hospital Authority") which the government contended was procured by a bribe of $10,000 arranged by QMC's president and part owner, Fischer, to the Chief Financial Officer of the Hospital Authority. (R1/51)

Counts One and Two charged violations under 18 U.S.C. § 666 which alleged that Fischer obtained the $1.2 million loan by fraud and that Fischer bribed the Chief Financial Officer of the Hospital Authority to get the loan. (R1/51) Counts Three through Six alleged conspiracy, wire and mail fraud, all stemming from the same incident. (R1/51) Counts Seven through Thirteen alleged money laundering under 18 U.S.C. § 1957. The money laundering counts provided that the specified unlawful activity was 18 U.S.C. § 666.

At trial the evidence established that QMC received the proceeds from the $1.2 million loan from the Hospital Authority on July 2, 1993. (R6/398) In late August 1993 QMC at the direction of the Chief Financial Officer of the Hospital Authority paid $10,000 to the Chief Financial Officer's mother.

The defense contended that the $10,000 payment was an after-the-fact gratuity rather than a bribe. The defense also sought to establish that the loan was a bona fide debt of QMC.

The proof at trial revealed that the Hospital Authority was a separate taxing district that operated hospitals in Volusia County, Florida. (R7/631) The Hospital Authority received no federal funds except payment for services provided to Medicare and Medicaid patients, in the same manner as a private hospital. (R7/567-568; 620-621)

Additionally, testimony was presented that in 1993 the Hospital Authority received between $10-15 million from Medicare. (R7/567-568) No other evidence was presented which established any other sums paid by the Federal Government to the Hospital Authority.

REASONS FOR GRANTING THE WRIT

I. The Eleventh Circuit's Opinion Directly Conflicts With The Tenth Circuit's Opinion In *United States v. LaHue*, 170 F.3d 1036 (10th Cir. 1999) (*App.* 18) Which Establishes That Payments To Health Care Providers For services To Medicare Patients Do Not Meet The Jurisdictional Requirements Of $10,000 In Benefit Payments Per 18 U.S.C. § 666(b).

The continuous expansion of federal law enforcement into areas traditionally belonging to state and local governments is contrary to the fundamentals of federalism. In this case, the government utilized 18 U.S.C. § 666 to reach theft and bribery concerning a local hospital which has been traditionally subject to state criminal law enforcement.

The theft and bribery in this case was made a federal crime under 18 U.S.C. § 666 because the Hospital Authority received payment for providing services to Medicare and Medicaid patients. In affirming the conviction, the Eleventh Circuit has turned every theft, bribery, robbery, and embezzlement in excess of $5,000 from or involving a health care provider, (hospital, doctor, or nursing home), into a federal offense under 18 U.S.C. § 666 (as long as the provider received $10,000 in Medicare or Medicaid funds).

The Tenth Circuit in *LaHue* held that 18 U.S.C. § 666 did not apply when the provider was simply being paid for providing services to Medicare beneficiaries, *i.e.*, the patients. (*App.* 20)

To establish that Mr. Fischer had violated 18 U.S.C. § 666(a)(1) and (a)(2) the Government was required to

prove, in part, that the Hospital Authority was an entity which received " . . . benefits in excess of $10,000 under a Federal program involving a grant, contract, subsidy, loan, guarantee, insurance, or other form of Federal assistance." 18 U.S.C. § 666(b). The only evidence presented to support this requirement was testimony that the Hospital Authority received between $10-15 million in Medicare payments during the relevant period. (*App.* 7) There was no further testimony as to whether this payment by Medicare was pursuant to Medicare Part A or Part B.

On this record the Eleventh Circuit concluded that the Medicare program was a "federal assistance program" and therefore the Hospital Authority's receipt of these funds satisfied Section 666(b). (*App.* 9) The Eleventh Circuit stated, "[b]ecause WVHA received payments under a federal assistance program, WVHA received a type of 'benefits' expressly covered by § 666(b)." (*App.* 11) Therefore under the Eleventh Circuit's holding Section 666(b) is satisfied if the subject agency or private company receives payments which originated from a "federal assistance program," even if the payment is for providing services or selling a product.

The Tenth Circuit in *LaHue* found that payments under Medicare Part B did not satisfy Section 666(b) as the payments did not constitute a "benefit" contemplated by the statute. (*App.* 32) The benefits were received by the Medicare patients. (*App.* 22) The payments to the health care provider was therefore held a payment for services, not a benefit under the statute. (*App.* 23)

In *LaHue* the government argued that the language of Section 666(b) was sufficiently broad to encompass the

receipt of assigned payments under the Medicare Act. (*App.* 25) The *LaHue* court found that under the government's reading of Section 666(b) all monies could be considered federal benefits as long as the funds originated under a federal assistance program. (*App.* 26) This result would lead to virtually limitless liability under Section 666 since once a federal payment had been made to the intended beneficiary, the further assignment of that payment would still fall within the statute. (*App.* 26) The *LaHue* court concluded that such a result was particularly egregious in light of the fact that Section 666 is a criminal statute. (*App.* 25)

Given the interpretation sought by the government the *LaHue* court found Section 666(b) to be ambiguous. Specifically the *LaHue* court found that it was unclear what Congress intended in Section 666(b) by employing the language, "receives . . . benefits . . . under a Federal Program." (*App.* 28)

To resolve the ambiguity of Section 666(b) the *LaHue* court looked to the legislative history and underlying purpose of the statute. (*App.* 28) The legislative history disclosed that the underlying purpose of the statute was "to protect the integrity of the vast sums of money distributed through federal programs from theft, fraud, and undue influence by bribery." S.Rep.No. 95-225 at 370 (1984), reprinted in 1984 U.S.C.C.A.N. 3182, 3511. (*App.* 28)

In applying the legislative history the *LaHue* court concluded:

> . . . that Congress intended the reference in section 666(b) to an organization receiving federal program benefits to mean one that receives benefits before final distribution to the intended beneficiary, here the patient. What happens to the funds once the patient receives them is beyond the scope of section 666. Thus, any assignment of such funds to a third party does not constitute a receipt of federal program benefits within the reach of section 666. We are not persuaded it was Congress's intent in enacting section 666(b) to follow the intended beneficiaries' further distribution of the federal benefits.

(*App.* 32)

The *LaHue* court's analysis regarding the interpretation of Section 666 is consistent with that of other courts. In *United States v. Wyncoop*, 11 F.3d 119, 123 (9th Cir. 1993) the court reasoned that an expansive interpretation of Section 666 would cause each theft in excess of $5,000 from a grocery store to constitute a federal offense due to the store's receipt of food stamps.

In *United States v. Copeland*, 143 F.3d 1439, 1441 (11th Cir. 1998) another panel of the Eleventh Circuit rejected the government's interpretation of the term "federal assistance" which would have encompassed federal payments to defense contractors. The court found that while defense contracts might be "unique" since contractors were provided with detailed specifications for armament this was insufficient to establish that the contractor had itself received a "benefit" as required by the statute. *Id.* at 1442. Rather the court concluded that defense contractors were merely engaged in commercial transactions with the federal government. *Id.* There should be no distinction

between the protection afforded federal payments for jet fighters under the National Defense Program and federal payments for medical services under the Medicare Program.

The Eleventh Circuit's opinion in *Fischer* permits amounts paid to any hospital or health care provider under Medicare or Medicaid to constitute a benefit for jurisdictional purposes under Section 666 merely because the payment originated from a federal assistance program. This holding therefore permits virtually endless federal jurisdiction under Section 666. Furthermore, this conclusion is contrary to the plain language of 18 U.S.C. § 666(c) which specifically excludes from consideration amounts reimbursed by the Federal Government.

Congress specifically chose to exclude certain items from the scope of Section 666. These excluded items are listed in § 666(c) which provides: "This section does not apply to bona fide salary, wages, fees, or other compensation paid, or expenses paid or reimbursed, in the usual course of business." As Medicare payments are reimbursement to the health care provider for services rendered to beneficiaries these amounts are specifically excluded from Section 666.

The Medicare Act has been reviewed by this Court in two recent decisions. *Your Home Visiting Nurse Services, Inc. v. Shalala*, ___ U.S. ___, 119 S.Ct. 930, 142 L.Ed.2d 919 (1999) and *Shalala v. Guernsey Memorial Hospital*, 514 U.S. 87 (1995). In each of these cases this Court has adhered to the plain language of the Medicare Statute and has determined that providers of health care are only entitled to reimbursement for services rendered.

This Court stated in *Your Home Visiting Nurse Services, Inc.* the following:

> Under the Medicare Act, Title XVIII of the Social Security Act, 79 Stat. 290, as amended, 42 U.S.C. § 1395 (1994 ed. and Sup. II), *et seq.*, the Secretary of Health and Human Services reimburses the providers of covered health services to Medicare beneficiaries, see §§ 1395f(b)(1), 1395h, 1395x(v)(1)(A). A provider seeking such reimbursement submits a yearly cost report to a fiscal intermediary (generally a private insurance company) that acts as the Secretary's agent. See 42 C.F.R. § 405.1801(b) (1997). The intermediary analyzes the cost report and issues a Notice of Program Reimbursement (NPR) determining the amount of reimbursement to which the provider is entitled for the year. See § 405.1803.

Your Home Visiting Nurse Services, Inc., 119 S.Ct. at 932.

Furthermore, participating hospitals are only reimbursed for "reasonable costs". Reasonable costs are defined by statute to be, "the cost actually incurred excluding therefrom any part of incurred cost found to be unnecessary in the efficient delivery of needed health services. § 1395x(v)(1)(A)." *Guernsey Memorial Hospital*, 514 U.S. at 92.

Similarly, this Court noted that the secretary is authorized to promulgate regulations to determine reasonable costs. *Id.* The secretary is further under a mandate to ensure that the [Medicare] program bears neither more nor less than its fair share of costs. 42 U.S.C. § 1395x(v)(1)(A)(i) ("[T]he necessary costs of efficiently delivering governed services to individuals covered by

[Medicare] will not be borne by individuals not so covered, and the costs with respect to individuals not so covered will not be borne by [Medicare].") *Id.* at 97, 98.

While health care providers may enjoy having additional patients to service due to Medicare payments these providers must nonetheless ply their trade to receive payment under the program. Additionally under the Medicare statutory framework health care providers are not responsible for administering federal funds since health care providers are only entitled to reimbursement.

A canon of statutory construction mandates that, "[c]ourts in applying criminal laws generally must follow the plain and unambiguous meaning of statutory language. 'Only the most extraordinary showing of contrary intentions' in the legislative history will justify a departure from that language." *Salinas v. United States*, 522 U.S. 52, 118 S.Ct. 469, 474, 139 L.Ed.2d 352 (1997).

The *LaHue* court recognized that the purpose of Section 666 was to protect federal funds from diversion by direct beneficiaries and those who administer or disburse funds for the benefit of individual beneficiaries. The *Fischer* decision expands the statute's reach to any health care provider that receives payments for services. Such a result is beyond the statute's reach and expands federal law enforcement into areas belonging to local and state governments.

II. The Eleventh Circuit's Decision Is Arguably In Conflict With The Second Circuit's Opinion In *United States v. Zyskind*, 118 F.3d 113 (2d Cir. 1997) And The Ninth Circuit's Opinion In *United States v. Wyncoop*, 11 F.3d 119 (9th Cir. 1993) As Each Of Those Circuits Has Determined That 18 U.S.C. § 666 Does Not Extend To Situations Where The Agency Which Receives Federal Funds Does Not Administer Those Funds.

The Eleventh Circuit's opinion as to the scope of Section 666 creates a significant circuit split. A review of decisions from the Second Circuit and the Ninth Circuit indicates that the Eleventh Circuit's decision greatly expands the scope of § 666 beyond the holdings of each of those circuits.

In *Zyskind* the administrators of an adult home received federal funds which they were to administer for the benefit of a resident of the home. *Zyskind*, 118 F.3d at 114. At issue was whether the adult home that received the federal funds and administered those funds in a fiduciary capacity for the residents of the home received a benefit with the meaning of Section 666(b). *Id.* at 115.

In *Zyskind* the fiduciary duty of the defendant was based on an agreement the defendant entered into with the Veterans' Administration. Under the agreement the defendant was entitled to receive and administer federal funds paid on behalf of a resident of the adult home. The V.A. was authorized to enter the agreement pursuant to 38 U.S.C. § 3202(a)(1) (1988), which permitted the V.A. to pay benefits due and owing to a beneficiary to a caretaker or custodian. *Id.*

As the defendant in *Zyskind* was responsible for the administration and further distribution of these funds the court found that the defendant did fall within Section 666. *Id.* at 116.

In conclusion the *Zyskind* court stated that Section 666 was enacted "to prevent diversions of federal funds not only by agents of organizations that are direct beneficiaries of federal benefits funds, but by agents of organizations to whom such funds are 'disbursed' for further 'distribution' to or for the benefit of the individual beneficiaries." *Id.*

Under the Second Circuit's analysis in *Zyskind* as applied to the instant case, Section 666 would not be satisfied. The receipt of $10-15 million of Medicare payments by the Hospital Authority is not a benefit to the Hospital Authority, but rather a payment of services. The benefit is received by the patient in the form of having the medical bills paid. Likewise, the Hospital Authority was not administering or disbursing funds for the patients. The payment received became the property of the Hospital Authority. Once the Hospital Authority received this payment of the $10-15 million from Medicare, it could use this money according to its own policies. The federal government had no further interest in ensuring that this money was utilized to achieve any federal goals.

However, the decision of the Eleventh Circuit extends Section 666 to the Hospital Authority even though the Hospital Authority has no obligation to continue to administer these funds in conformance with any federal program.

Likewise, the Ninth Circuit's decision in *Wyncoop* is in conflict with the Eleventh Circuit's decision. In *Wyncoop* a private college participated in the federal student loan programs. *Wyncoop*, 11 F.3d at 121. The government sought to establish jurisdiction under Section 666 on the basis of the college's receipt of tuition payments funded by the student loan program. *Id.*

The *Wyncoop* court found that the intended beneficiaries of the student loan program were students. *Id.* Additionally, the participating college was not responsible for administering any federal funds. *Id.* at 122. Therefore, the *Wyncoop* court concluded that Section 666 was not satisfied as the college in question did not receive benefits as required by Section 666(b). *Id.* The court also noted that the college enjoyed a benefit in the sense that the college's enrollment increased due to the existence of the federal student loan program, but, since the college was not itself the intended beneficiary and did not administer any federal funds, Section 666 was not satisfied. *Id.* at 121-22.

Under the Ninth Circuit's analysis in *Wyncoop* as applied to the instant case, Section 666 would not be satisfied. The mere receipt of Medicare reimbursement payments is not a benefit to the Hospital Authority as contemplated under the statute. Furthermore, the Hospital Authority is not responsible for administering any federal funds.

Therefore, in the Second, Ninth, and Tenth Circuits, citizens may engage in behavior which would not subject them to federal prosecution, but the same behavior would be a federal offense in the Eleventh Circuit. These

cases present a significant conflict on the reach of 18 U.S.C. § 666.

CONCLUSION

The Eleventh Circuit has greatly extended the scope of Section 666. The Eleventh Circuit merely requires that a benefit be received from a "federal assistance program". Whether the benefit is derived directly from the federal government or indirectly is immaterial to the Eleventh Circuit's analysis. Furthermore, the Eleventh Circuit failed to utilize the exclusions found in Section 666(c) which excludes in part amounts paid by the federal government as "reimbursement". Without employing the safeguards found in Section 666(b) and (c) the Eleventh Circuit has created a statute of virtually endless federal jurisdiction over health care providers who service Medicare and Medicaid patients. Therefore, this cause merits the immediate attention of this Court and the writ should be granted.

Respectfully submitted,

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UNITED STATES of America,
Plaintiff-Appellee,

v.

Jeffrey Allan FISCHER,
Defendant-Appellant.

Nos. 96-3587, 97-2877 and 98-2091.

United States Court of Appeals,
Eleventh Circuit.

March 4, 1999.

Mark L. Horwitz, Orlando, FL, for Defendant-Appellant.

Charles R. Wilson, U.S. Atty., Tamra Phipps, Susan Humes Raab, David P. Rhodes, Asst. U.S. Attys., Tampa, FL, for Plaintiff-Appellee.

Appeal from the United States District Court for the Middle District of Florida.

Before ANDERSON and HULL, Circuit Judges, and HANCOCK*, Senior District Judge.

HULL, Circuit Judge:

A jury convicted appellant Jeffrey Allan Fischer on thirteen counts, including violations of 18 U.S.C. §§ 371 (conspiracy), 666 (fraud and bribery involving an organization receiving federal funds), 1341 (mail fraud), 1343 (wire fraud), and 1957 (money laundering).[1] Fischer appeals his convictions and sixty-five-month sentence.

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* Honorable James H. Hancock, Senior U.S. District Judge for the Northern District of Alabama, sitting by designation.

[1] The jury convicted Fischer of one count of fraud involving an organization receiving federal funds, in violation of 18 U.S.C.

Fischer contends, *inter alia*, that his convictions on two counts under § 666 and on a related conspiracy count should be reversed because the Government did not prove the statutory prerequisite that the agency affected by Fischer's wrongdoing "receives, in any one year period, benefits in excess of $10,000 under a Federal program involving a grant, contract, subsidy, loan, guarantee, insurance, or other form of Federal assistance." 18 U.S.C. § 666(b).[2] After review, we affirm Fischer's convictions and sentence.

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§ 666(a)(1)(A) (Count I); one count of giving a kickback to an agent of an organization receiving federal funds, in violation of 18 U.S.C. § 666(a)(2) (Count II); one count of mail fraud, in violation of 18 U.S.C. § 1341 (Count III); two counts of wire fraud, in violation of 18 U.S.C. § 1343 (Counts IV-V); one count of conspiracy to commit fraud involving an organization receiving federal funds, to give and accept a kickback involving an organization receiving federal funds, and to commit wire fraud, in violation of 18 U.S.C. § 371 (Count VI); and seven counts of money laundering, in violation of 18 U.S.C. § 1957 (Counts VII-XIII).

[2] Fischer also challenges (1) the sufficiency of the evidence regarding his intent to defraud and to bribe, (2) the particularity of the indictment, (3) the admission of evidence relating to his prior fraud convictions, (4) certain statements by the prosecutor during opening statement and closing argument, (5) the district court's decision not to hold an evidentiary hearing in reference to a *Brady* violation alleged in Fischer's motions for a new trial, and (6) the district court's finding that Fischer had the ability to pay restitution. After careful consideration of each of these claims, we affirm the judgment of the district court. *See* 11th Cir.R. 36-1.

I. BACKGROUND

A. $1.2 Million Loan

At trial, the evidence established that in 1993 Fischer, as president and part-owner of QMC, arranged for West Volusia Hospital Authority ("WVHA") to loan $1.2 million to QMC. Fischer negotiated this loan with WVHA's chief financial officer, Robert Caddick. On June 30, 1993, Fischer and Caddick executed the loan agreements between QMC and WVHA.

As security for the $1.2 million loan, Fischer pledged QMC's accounts receivable and a $1 million letter of credit QMC had obtained for this purpose through a foreign bank, First Asia Development Bank ("FADB"). However, QMC's accounts receivable already were pledged to another QMC creditor. In addition, the $1 million letter of credit did not appear to be legitimate, and even if it were, its terms severely limited WVHA's ability to collect the $1 million.[3]

Furthermore, questions were raised about WVHA's authority to loan money to QMC. The questions arose both before WVHA loaned the $1.2 million to QMC, and later, when WVHA's board of directors discovered the

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[3] After reviewing the $1 million letter of credit, the account representative at WVHA's bank expressed concerns to Caddick and to Fischer about the legitimacy of the letter of credit and about WVHA's ability to collect on the letter of credit, if necessary. The account representative's concerns were based on the facts that she had never heard of FADB and that the letter of credit had not been signed, would expire even before the WVHA-QMC loan matured, and required QMC's approval before WVHA could collect on it.

loan had been made. WVHA, a local government agency funded by a bond issue, was authorized to invest its excess funds in only instruments backed by the federal government.[4]

Nonetheless, WVHA made the $1.2 million loan to QMC on July 2, 1993. QMC used the $1.2 million to repay creditors and to raise the salaries of QMC's five owner-employees, including Fischer. In addition, Fischer had QMC lend at least $100,000 to a company owned by the FADB representative who had assisted QMC with the $1 million letter of credit. Fischer also had QMC open options-trading accounts using these loan proceeds. In a short time, Fischer lost about $400,000 of the loan proceeds through his options-trading on QMC's behalf.[5]

In February 1994, WVHA's auditors disclosed the $1.2 million loan to QMC in the annual audit report. Through this report, WVHA's board of directors and the chairman of WVHA's finance committee first learned about the $1.2 million loan. Shortly thereafter the board

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[4] As a result of a proposal presented by Caddick in April 1993, WVHA's finance committee did expand Caddick's investment authority. At trial, however, evidence indicated that investment in loans to private entities, such as QMC, still would not have been authorized.

[5] To show that Fischer had a pattern of fraudulently obtaining money and then using that money to speculate in the securities market, the Government introduced evidence that Fischer, while a broker for E.F. Hutton, had embezzled two million dollars of his clients' money. Fischer thereafter lost the two million dollars in failed investments. As a result of these actions, Fischer was convicted on three counts of mail fraud on April 12, 1985.

asked that the loan be called. The due date for the loan was July 1, 1994.

On July 1, 1994, QMC did not have the funds to repay the loan. Later that month, Fischer persuaded FADB to send QMC a $1.2 million draft to repay WVHA. QMC endorsed this draft and presented it to WVHA, which in turn presented the draft to its bank. However, FADB refused to honor the draft when presented by WHVA's bank. Thus, WVHA was unable to collect the $1.2 million owed by QMC.

B. $10,000 Kickback to Caddick

The evidence indicated that, in June 1993, Caddick requested a $10,000 loan from QMC at the end of one of Fischer and Caddick's initial meetings about the possibility of the $1.2 million loan. After QMC received the $1.2 million loan from WVHA, QMC paid $10,000 by check to Caddick's mother, Stella Greenfield, in August 1993. This $10,000 check, paid with Fischer's approval, was marked "consulting fees" – even though Greenfield never performed any services for QMC. Greenfield sent the proceeds of the $10,000 check to Caddick, pursuant to Caddick's instructions.

In January 1994, a QMC bookkeeper sought an invoice to correspond with the earlier $10,000 check to Greenfield. The bookkeeper received an invoice dated August 1, 1993. A notation appeared on the invoice in Fischer's handwriting, indicating that the payment was for a "loan origination fee."

Another attempt to cover up QMC's $10,000 payment to Caddick apparently was made after QMC defaulted on the $1.2 million loan from WVHA and that default became the subject of an investigation and widespread publicity. In this cover-up attempt, Caddick allegedly approached QMC's vice-president, Charles Kramer, with a "contract" for programming services Caddick purportedly had performed for QMC. Caddick allegedly asked Kramer to sign and backdate the "contract" to create a retroactive justification for the $10,000 payment. However, Kramer refused.

C. WVHA's Receipt of Federal Benefits

To establish that Fischer had violated 18 U.S.C. §§ 666(a)(1) and (a)(2), the Government was required to prove that WVHA was an agency receiving, in any one year period, "benefits in excess of $10,000" under a federal assistance program. 18 U.S.C. § 666(b).[6] At trial, the

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[6] In relevant part, 18 U.S.C. § 666 provides as follows:

(a) Whoever, if the circumstance described in subsection (b) of this section exists –

(1) being an agent of an organization, or of a State, local, or Indian tribal government, or any agency thereof –

(A) embezzles, steals, obtains by fraud, or otherwise without authority knowingly converts to the use of any person other than the rightful owner or intentionally misapplies, property that –

(i) is valued at $5,000 or more, and

(ii) is owned by, or is under the care, custody, or control of such organization, government, or agency; or

Government introduced evidence that WVHA was a county agency responsible for operating two county hospitals. The Government also introduced testimony from WVHA's director of finance that "most health care organizations collect a majority of their funds from programs that are funded by the federal government." Asked to give an example of how much money WVHA specifically collected in 1993 from the federal government under the Medicare program alone, WVHA's director of finance testified that WVHA had collected between ten and fifteen million Medicare dollars in 1993.

Later on, WVHA's director of finance explained further that different government programs pay differently. WVHA's director of finance then testified:

. . . .

(2) corruptly gives, offers, or agrees to give anything of value to any person, with intent to influence or reward an agent of an organization or of a State, local, or Indian tribal government, or any agency thereof, in connection with any business, transaction, or series of transactions of such organization, government, or agency involving anything of value of $5,000 or more; shall be fined under this title, imprisoned not more than 10 years, or both.

(b) The circumstance referred to in subsection (a) of this section is that the organization, government, or agency receives, in any one year period, benefits in excess of $10,000 under a Federal program involving a grant, contract, subsidy, loan, guarantee, insurance, or other form of Federal assistance.

18 U.S.C. §§ 666(a)-(b).

> A specific example is that we get paid, hospitals get paid a fixed amount from the federal government on in-patient Medicare patients, patient[s] who are greater than the age of 65. So raising the prices for services that are primarily used for individuals in that group has no impact. There's no increase in revenue.

Thus, according to the testimony of WVHA's director of finance, even if the hospital charges the patient an increased amount for services, the hospital is paid only a fixed amount from Medicare for those services.

II. DISCUSSION[7]

A. Scope of § 666(b)

The statutory prerequisite for a conviction under 18 U.S.C. § 666 is that the organization or agency affected by the fraud, unauthorized conversion, bribery, or other prohibited act "receives, in any one year period, benefits in excess of $10,000 under a Federal program involving a grant, contract, subsidy, loan, guarantee, insurance, or other form of Federal assistance." 18 U.S.C. § 666(b). In the present case, the primary issue is whether WVHA received "benefits" under a federal assistance program

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[7] The issues we discuss here involve statutory interpretation and sufficiency of the evidence. We review *de novo* issues of statutory interpretation. *United States v. MacAllister*, 160 F.3d 1304, 1306 (11th Cir.1998). We also review *de novo* sufficiency of the evidence, viewing the evidence in the light most favorable to the Government and drawing all reasonable inferences and credibility choices in favor of the jury's verdict. *United States v. Trujillo*, 146 F.3d 838, 845 (11th Cir.1998).

for purposes of § 666(b). After review, we find that WVHA's receipt of between ten and fifteen million dollars in Medicare funds qualified as receipt of "benefits" under a federal assistance program and that the Government presented sufficient evidence to satisfy the requirements of 18 U.S.C. § 666(b).

This Court previously addressed the scope of § 666(b) in *United States v. Copeland*, 143 F.3d 1439 (11th Cir.1998). At issue in *Copeland* was whether Lockheed, a prime contractor for the United States Department of Defense, qualified as an organization receiving "benefits" for purposes of § 666(b). *Id.* at 1441. Defendant Copeland, a manager at one of Lockheed's plants, had been convicted of violating 18 U.S.C. § 666 by accepting bribes from individuals including co-defendant Winders. *Id.* at 1440. In turn, defendant Winders had been convicted of violating 18 U.S.C. § 666 by giving bribes to co-defendant Copeland. *Id.* On appeal, the defendants argued that their convictions under § 666 should be reversed because the Government had failed to prove that Lockheed met the requirements of § 666(b). *Id.*

In reviewing the defendants' claims in *Copeland*, this Court examined the statutory language and construed § 666(b) as requiring that the "benefits" an organization or agency receives from the federal government be linked to some form of federal assistance. *Id.* at 1441. Specifically, this Court recognized that organizations engaging in contractual relationships with the federal government would fall within the scope of the statute, if those "contractual relationships constitut[ed] some form of 'Federal assistance.' " *Id.* This Court also determined that "organizations engaged in purely commercial transactions with

the government" were excluded from the scope of § 666(b) because those organizations were not in relationships involving some form of federal assistance. *Id.*

Based on the evidence at trial, this Court in *Copeland* concluded that Lockheed's relationship with the government did not come within the scope of § 666(b) because Lockheed's transactions as a defense contractor were "purely commercial." *Id.* at 1442. Nothing in the record indicated that Lockheed had received "benefits" under a federal program involving a contract or any other form of federal assistance. *Id.* The record did contain evidence that Lockheed received funds from the government through its defense contracts, but those funds were not "benefits" within the meaning of § 666(b) because those funds were not received under a federal program involving federal assistance. *Id.* Instead, those funds were received as a result of "purely commercial transactions with the government." *Id.* Because this statutory prerequisite of receiving "benefits" under a program of federal assistance was not met, this Court vacated Copeland's and Winders's convictions under § 666. *Id.*

B. Sufficiency of the Government's Evidence Under § 666(b)

The evidence in the present case contrasts sharply with that in *Copeland*. Whereas Lockheed received federal dollars through purely commercial transactions, WVHA, as an agency responsible for the administration of two hospitals, actually received payments from the federal government under several federal assistance programs. For example, evidence introduced at the trial in this case

clearly established that, in 1993, WVHA received between ten and fifteen million dollars under the federal Medicare assistance program. In fact, WVHA's finance director's testimony indicated that the ten to fifteen million dollars WVHA collected under the Medicare program in 1993 was paid directly to WVHA for providing health care services to covered individuals.

Section 666(b) provides that the "benefits" an organization receives under a federal program can be in the form of "a grant, contract, subsidy, loan, guarantee, insurance, or other form of Federal assistance." 18 U.S.C. § 666(b) (emphasis added). Because WVHA received payments under a federal assistance program, WVHA received a type of "benefits" expressly covered by § 666(b). Thus, the statutory prerequisite for Fischer's convictions under § 666 was satisfied.

Having reached this result based entirely on the plain language of § 666(b), we normally would not examine the legislative history of the statute. *See United States v. Copeland*, 143 F.3d 1439, 1441 (11th Cir.1998). However, as this Court observed in *Copeland*, some circuits have found § 666(b) to be ambiguous on its face. *Id.* As a result, it is worth noting that the legislative history of § 666(b) also supports our conclusion. The statute's legislative history indicates that the language of § 666(b) is to "be construed broadly, consistent with the purpose of this section to protect the integrity of the vast sums of money distributed through Federal programs from theft, fraud, and undue influence by bribery." S.Rep. No. 225, 98th Cong., 2d Sess. 369-70 (1984), *reprinted in* 1984 U.S.C.C.A.N. 3182, 3510-11. In this case, our determination that WVHA is an agency receiving "benefits" within the meaning of

§ 666(b) serves the statute's purpose of protecting from fraud, theft, and undue influence by bribery the money distributed to health care providers, and WVHA in particular, through the federal Medicare program and other similar federal assistance programs.[8]

C. "Target Recipient" Analysis Not Required

Fischer's main argument that the Medicare funds received by WVHA are not "benefits" for purposes of § 666(b) relies on a narrow construction of "benefits" that does not consider the context in which the term appears. Fischer primarily bases his argument on a district court decision in *United States v. LaHue*, 998 F.Supp. 1182 (D.Kan.1998). In *LaHue*, the court concluded that a group of physicians who received Medicare funds and, more

[8] Although the legislative history may seem to indicate otherwise, we observe that this Court already has held that the government is not required to prove a direct link between the federal assistance and the fraudulent conduct in issue. *United States v. Paradies*, 98 F.3d 1266, 1288-89 (11th Cir.1996) (recognizing that a "connection to federal funds" is not required for a conviction under § 666). Instead, § 666(b) only requires the government to prove that WVHA is an agency that receives "benefits in excess of $10,000" under a federal assistance program, as we have already determined that the government has done. *See* 18 U.S.C. § 666; *United States v. Copeland*, 143 F.3d 1439, 1441 (11th Cir.1998). Thus, here the government was not required to prove a direct link between the Medicare funds received by WVHA and either Fischer's fraudulently obtaining and converting the $1.2 million loan from WVHA or Fischer's bribing an agent of WVHA in connection with the $1.2 million loan.

specifically, funds under Medicare Part B,[9] as payment for their services had not received "benefits" for purposes of 18 U.S.C. § 666(b). *Id.* at 1186-87, 1192.

After reviewing the framework of the Medicare statute, the *LaHue* court concluded that Medicare patients, and not Medicare providers, are the "target recipients" of Medicare "benefits." *Id.* at 1185-86. In particular, the court observed that, under Part B of the Medicare program, patients may either pay their health care providers and then seek reimbursement from Medicare or may assign their "benefits" to their providers, allowing the providers to collect funds from Medicare. *Id.* at 1185. The *LaHue* court acknowledged that, under this framework, Medicare Part B providers "ultimately receive funds traceable to a federal program," but the court emphasized that these providers "do so only through patient payments or assignments." *Id.* at 1187. Thus, according to *LaHue*, the physicians' group involved in the case received funds under Part B of Medicare after those "benefits" had reached the "target recipients" of the program. *Id.* at 1187-88.

Finding the language of § 666(b) ambiguous as to whether these payments and assignments of funds that are traceable to Medicare Part B, but received "after" the funds have reached the "target recipients," qualify as "benefits" for purposes of § 666(b), the *LaHue* court examined the statute's legislative history. *Id.* at 1188-89. The *LaHue* court interpreted this legislative history, along

[9] The Medicare program is divided into two parts, Part A and Part B. *See* 42 U.S.C. § 1395, *et seq.*

with the few cases that have examined and applied § 666(b), as consistent with the court's conclusion that once the funds from a federal program reach the "target recipient," they cease to be "benefits" under a federal assistance program for purposes of § 666(b). *Id.* at 1187-90.

We decline to adopt *LaHue*'s "target recipient" analysis. We first note that, in this case, the testimony of WVHA's finance director indicated that in 1993 WVHA received ten to fifteen million dollars from the Medicare program. The finance director's testimony did not clearly establish whether WVHA received funds directly from the Medicare program or received funds as an assignee under Part B or even Part A of the federal program. Thus, there is a possibility in this case that WVHA received funds directly from the Medicare program without having been assigned the right to receive those funds by a patient. However, even if WVHA received funds as an assignee, the plain language of § 666(b) does not distinguish between an organization, government, or agency that receives "benefits" directly under a federal program and an organization, government, or agency that receives "benefits" as an assignee under a federal program.

Moreover, the language of § 666(b) also does not require that "the organization, government, or agency receiv[ing] . . . benefits" be the "target recipient" of the federal program at issue. Instead, the language focuses on the source of the "benefits", requiring that the "benefits" have been received "*under* a Federal program *involving* a grant, contract, subsidy, loan, guarantee, insurance, or other form of *Federal assistance*." 18 U.S.C. § 666(b) (emphasis supplied). Thus, in context, the use of the term

"benefits" serves to emphasize not that the recipient must be a "target recipient", but rather that the funds must have been received by the organization, government, or agency as part of an "assistance" program, rather than a purely commercial transaction – the federal government's purchase of goods from a contractor, for example. *See United States v. Copeland*, 143 F.3d 1439 (11th Cir.1998).

III. CONCLUSION

For all of the foregoing reasons, Fischer's convictions and sentence are AFFIRMED.

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

Nos. 96-3587, 97-2877, and 98-2091

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

JEFFREY ALLAN FISCHER,
Defendant-Appellant

On appeal from the United States District Court
for the Middle District of Florida

(Filed Apr. 28, 1999)

ON PETITION(S) FOR REHEARING AND PETITION(S) FOR REHEARING EN BANC

(Opinion _____, 11th Cir., 19__, ___F.2d ___).

Before: ANDERSON and HULL, Circuit Judges, and HANCOCK*, Senior District Judge.

PER CURIAM:

The petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate

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* Honorable James H. Hancock, Senior U.S. District Judge for the Northern District of Alabama, sitting by designation.

Procedure; Eleventh Circuit Rule 35-5), the Petition(s) for Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

/s/ Frank M. Hull
UNITED STATES CIRCUIT JUDGE

ORD-42
(6/95)

UNITED STATES of America, Plaintiff-Appellant,

v.

Robert C. LaHUE, doing business as Robert C. LaHue, D.O., Chartered, doing business as Blue Valley Medical Group; Ronald H. LaHue, Defendants-Appellees,

No. 98-3146.

United States Court of Appeals, Tenth Circuit.

March 23, 1999.

Sean Connelly, Attorney, Department of Justice, Denver, Colorado (Jackie N. Williams, United States Attorney, and Tanya J. Treadway, Asst. United States Attorney, District of Kansas, and William H. Bowne, Department of Justice, Washington, D.C., with him on the briefs), for Plaintiff-Appellant.

Jeffrey D. Morris, of Bryan Cave LLP, Overland Park, Kansas (James L. Eisenbrandt, of Bryan Cave LLP, Overland Park, Kansas, Nilesh S. Patel, Kansas City, Missouri, and Bruce Houdek, Kansas City, Missouri, with him on the briefs), for Defendants-Appellees.

Before SEYMOUR, Chief Judge, EBEL and KELLY, Circuit Judges.

SEYMOUR, Chief Judge.

Defendants Dr. Ronald LaHue and Dr. Robert LaHue, agents of Blue Valley Medical Group (BVMG), were indicted on one count of conspiracy under 18 U.S.C. § 371 (count 1), seven counts of Medicare fraud under the Anti-

Bribery Act, 18 U.S.C. § 666(b) (counts 2 through 8), one count of conspiracy under 18 U.S.C. § 286 (count 9), and one count of witness tampering under 18 U.S.C. § 1512 (count 10). The district court granted defendants' motion to dismiss counts 2 through 8 on the theory that BVMG did not receive federal benefits as required by section 666(b) and therefore was not within the ambit of the statute.[1] *United States v. LaHue*, 998 F.Supp. 1182, 1184 (D.Kan.1998). The government appeals, arguing that the alleged fraud falls within section 666(b) because BVMG

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[1] Section 666 provides in relevant part:

(a) Whoever, if the circumstance described in subsection (b) of this section exists –

(1) being an agent of an organization, or of a State, local, or Indian tribal government, or any agency thereof –

. . . .

(B) corruptly . . . accepts or agrees to accept, anything of value from any person, intending to be influenced or rewarded in connection with any business, transaction, or series of transactions of such organization, government, or agency involving anything of value of $5,000 or more;

. . . .

shall be fined under this title, imprisoned not more than 10 years, or both. (b) The circumstance referred to in subsection (a) of this section is that the organization, government, or agency receives, in any one year period, benefits in excess of $10,000 under a Federal program involving a grant, contract, subsidy, loan, guarantee, insurance, or other form of Federal assistance.

18 U.S.C. § 666(a, b).

was a recipient of Medicare reimbursements assigned to it by its patients. We affirm the district court.

I

From 1985 to 1995, BVMG provided services in Kansas and Missouri as one of the largest geriatric care practices in the United States. Dr. Robert LaHue was president of BVMG and his brother, Dr. Ronald LaHue, was vice-president. The LaHues and other BVMG physicians provided medical services to nursing home residents and also referred patients to various hospitals for inpatient and outpatient care.

The indictment alleged that the LaHues engaged in a criminal scheme to receive bribes from various hospitals in return for referring Medicare patients to the hospitals. It asserted that the LaHues proposed and entered into a number of sham consulting agreements where BVMG received annual consulting "fees" from each hospital in amounts ranging from $50,000 to $150,000 in return for referring patients to the paying hospital. The government charged that the scheme constituted federal government program fraud in violation of section 666, which applies to an organization that receives "benefits" under a federal program.

The LaHues moved to dismiss the charges of program fraud, asserting that Medicare reimbursements to doctors are not benefits within the meaning of section 666(b). The district court agreed. The court determined that Medicare payments are extended by Congress to the patient, who is both the intended recipient of the funds and the intended beneficiary of Medicare. The patient is

permitted voluntarily to direct the funds to the medical provider through assignment. Under this pattern of disbursement, the district court held that reimbursements to BVMG physicians can not be characterized as section 666 benefits from a federal program because those benefits were disbursed to the patient before dissemination to BVMG. Accordingly, the district court dismissed the claims against BVMG under section 666.[2]

II

In reviewing the district court's determination, we must decide whether providers of medical services to Medicare Part B patients fall within the statutory jurisdiction of 18 U.S.C. § 666(b). In other words, are the LaHues agents of an organization, BVMG, that "receive[d] *benefits* in excess of $10,000 under a Federal Program." *Id.* (emphasis added) In making this determination, we look first at the nature of the Medicare program, and then assess section 666 in light of that program.

A. Medicare Part B

Many BVMG patients were eligible for Medicare reimbursements under 42 U.S.C. §§ 1395j-1395k and used the reimbursements to pay for BVMG services under Medicare Act Part B. The Medicare Act consists of two

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[2] After the dismissal, the government impaneled a new grand jury that indicted the LaHues for the same alleged conduct under an anti-kickback statute, 42 U.S.C. § 1320a-7b, which criminalizes the acceptance of bribes for Medicare patient referrals.

parts: Part A, Hospital Insurance Benefits for the Aged and Disabled, 42 U.S.C. §§ 1395c-1395i;[3] and Part B, Supplementary Medical Insurance Benefits for the Aged and Disabled, 42 U.S.C. §§ 1395j-1395w. Our case exclusively addresses Medicare Part B payments. Part B of the Medicare system was established to provide "benefits" to the individual beneficiary for use in paying the costs of certain medical services, including physicians' services. Part B is a voluntary program where beneficiaries pay monthly premiums that, along with federal government contributions, are remitted to the Federal Supplementary Medical Insurance Trust Fund. *See id.* § 1395t. The Department of Health and Human Services has responsibility for administering the program and contracts with private insurance carriers who evaluate and pay Part B claims out of the Trust Fund. *See id.* § 1395u.

Under Part B, a physician may either request direct payment by patients on the basis of an itemized bill or accept assignment agreements. Under an assignment agreement, the beneficiaries execute formal assignments of their individual benefits to the physicians to compensate the physicians for health care services. *See id.* § 1395u(h). A physician who does not accept assignment can charge her patient in excess of the Medicare allowed expense, a practice called "balance billing." Medicare

[3] Part A concerns institutional health providers (hospitals, nursing homes, rural health clinics) and is funded out of Social Security taxes. Payment by Medicare under Part A for services rendered by a hospital or other institution may only be made to the institution, and the institution may not bill the patient directly, except for deductibles and coinsurance. Part A is not implicated under the government's theory in this case.

pays eighty percent of reasonable reimbursable claims while the beneficiary is responsible for the remaining twenty percent and any "balance billing." *See* 42 U.S.C. § 1395l. The dismissed charges at issue here all involved patient assignments directing that their Medicare reimbursements be sent to the BVMG physicians to pay for medical services rendered. A BVMG physician who accepted assignment agreed to accept a specified amount as full payment for each service. This assignment scheme implies that the intended beneficiary of Medicare Part B is the patient. The Medicare statute reinforces this interpretation. It provides in relevant part:

> **Scope of benefits; definitions**
>
> (a) The benefits provided to an individual by the insurance program [Medicare] established by this part shall consist of –
>
> (1) entitlement to have payment made to him or on his behalf (subject to the provisions of this part) for medical and other health services. . . .

42 U.S.C. § 1395k. As the statute reads, "benefits" are "provided to an individual," who has the authority to direct whether they are to be paid "to him or on his behalf." *Id.* With this in mind, we turn to an analysis of section 666.

B. 18 U.S.C. § 666

We review legal issues of statutory construction de novo. *United States v. Oberle*, 136 F.3d 1414, 1423 (10th Cir.1998). In interpreting section 666, we recognize that

the Supreme Court directs us to use restraint in interpreting federal criminal statutes. *Dowling v. United States*, 473 U.S. 207, 214, 105 S.Ct. 3127, 87 L.Ed.2d 152 (1985). "Courts in applying criminal laws generally must follow the plain and unambiguous meaning of the statutory language." *Salinas v. United States*, 522 U.S. 52, ___ , 118 S.Ct. 469, 474, 139 L.Ed.2d 352 (1997) (quoting *United States v. Albertini*, 472 U.S. 675, 680, 105 S.Ct. 2897, 86 L.Ed.2d 536 (1985)). Where the statute is ambiguous, we look to the legislative history and the underlying public policy of the statute. *See United States v. Simmonds*, 111 F.3d 737, 742 (10th Cir.1997).

The Anti-Bribery Act, 18 U.S.C. § 666, prohibits the unlawful acceptance of anything of value of $5,000 or more if the person taking the bribe is an agent of an organization subject to the statute. Whether an organization falls within the scope of the statute is determined pursuant to the limits of section 666(b), which reads:

> The circumstances referred to in subsection (a) of this section is that the organization, government, or agency receives, in any one year period, benefits in excess of $10,000 under a Federal program involving a grant, contract, subsidy, loan, guarantee, insurance, or other form of Federal assistance.

18 U.S.C. § 666(b). The district court acknowledged the superficial appeal of the government's contention that the plain language of section 666(b) includes the patient assignments to BVMG. *See LaHue*, 998 F.Supp. at 1187. The scope of section 666(b) jurisdiction reaches any organization that "receives . . . benefits" from a federal program in an amount over $10,000. 18 U.S.C. § 666(b).

Medicare is indisputably a federal program and BVMG did receive reimbursements in any one year in excess of $10,000 for its physicians' services to Medicare recipients.

In support of this argument, the government offers an analogy to anti-discrimination statutes, contending that "section 666 'expressly equates "benefits" with "Federal assistance." ' " Br. of Aplt. at 15 (quoting *United States v. Rooney*, 986 F.2d 31, 34 (2d Cir.1993)). The government then directs us to cases holding that providers who accept Medicare funds receive "federal assistance" under an anti-discrimination statute. *Id.* at 16 (citing *United States v. Baylor Univ. Med. Ctr.*, 736 F.2d 1039, 1042-48 (5th Cir.1984)). The government concludes by analogy that a health care provider who accepts Medicare funds thereby receives federal benefits and accordingly falls within the scope of section 666.

We are not persuaded by the analogy to anti-discrimination statutes, which are civil rather than criminal. We must exercise particular restraint in interpreting federal criminal statutes. *Dowling*, 473 U.S. at 214, 105 S.Ct. 3127. Moreover, there are inherent policy differences between these criminal and civil statutes.[4] Section 666 was designed to prevent diversions of federal funds enroute to their intended beneficiaries, whereas the anti-discrimination statutes were enacted to prevent the use of federal

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[4] We note in this regard that in *United States v. Baylor Univ. Med. Ctr.*, 736 F.2d 1039 (5th Cir.1984), the court expressly grounded its holding on the legislative history of the anti-discrimination statutes, judicial decisions construing them, and regulations adopted under them. *See id.* at 1042.

funds to support discrimination. *See United States v. Wyncoop*, 11 F.3d 119, 123 (9th Cir.1993) (Title IX anti-discrimination provision different in purpose and language from section 666).

Finally, like the district court, we believe that a closer look at the government's position reveals ambiguity in the plain meaning of section 666. Under the government's interpretation of section 666(b), any organization that is assigned $10,000 in a year in funds initially disbursed under a federal program source would fall within the statute. Thus, when funds have passed to the beneficiary and she assigns the funds further to any number of organizations which may assign them even further, the government's theory suggests that these monies are all considered benefits as long as they originated under a federal benefits program. Presumably under this interpretation, if the recipient physician endorsed Medicare checks to pay a supplier of medical goods, the supplier would be receiving benefits from a federal program. As the district court aptly noted, this construction creates almost a limitless statutory reach beyond a plain commonsense interpretation of the statute. *See LaHue*, 998 F.Supp. at 1187.[5] Even in the context of anti-discrimination statutes, the Supreme Court has distinguished

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[5] We note that § 666(c) refines § 666(b) by carving out certain transactions in the ordinary course of business: "This section does not apply to bona fide salary, wages, fees, or other compensation paid, or expenses paid or reimbursed, in the usual course of business." 18 U.S.C. § 666(c). *Cf. United States v. Copeland*, 143 F.3d 1439 (11th Cir.1998) (holding § 666(b) inapplicable to defense contractor without referencing § 666(c)). Neither the parties nor the district court addressed § 666(c), however. Since there are no circuit cases addressing § 666(c)'s application to § 666(b), we leave that analysis for another day. *See United States v. Grossi*, 143 F.3d 348, 350-51 (7th Cir.1998) (declining to decide whether certain payments have met § 666(c) requirements where the parties did not argue the issue below); *United States v. Mills*, 140 F.3d 630 (6th Cir.1998) (determining that § 666(c) applies to § 666(a)). We merely introduce § 666(c) as an additional legal wrinkle that contributes to the ambiguity of § 666(b).

between direct and indirect beneficiaries, holding that "federal coverage [does not follow] the aid past the recipient to those who merely benefit from the aid." *United States Dept. of Trans. v. Paralyzed Veterans of America*, 477 U.S. 597, 607, 106 S.Ct. 2705, 91 L.Ed.2d 494 (1986) (construing 29 U.S.C. § 794 prohibition against subjecting handicapped individuals "to discrimination under any program or activity receiving Federal financial assistance."). In so holding, the Court pointed out that if the statutes were construed to extend to all those who receive an indirect economic benefit from the federal assistance, "[t]he statutory 'limitation' on [the anti-discrimination statute's] coverage would virtually disappear, a result Congress surely did not intend."[6] *Id.* at 609, 106 S.Ct.

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[6] In New York Conference of *Blue Cross v. Travelers Ins. Co.*, 514 U.S. 645, 115 S.Ct. 1671, 131 L.Ed.2d 695 (1995), the Supreme Court similarly refused to extend a statutory phrase to its full expansive meaning.

> The governing text of ERISA is clearly expansive. Section 514(a) marks for pre-emption "all state laws insofar as they . . . *relate* to any employee benefit plan" covered by ERISA, and one might be excused for wondering, at first blush, whether the words of limitation ("insofar as they . . . relate") do much limiting. *If "relate to" were taken to extend to the furthest stretch of its indeterminancy, then for all practical purposes pre-emption would never run its course, for*

2705. Similarly, in our judgment, the implausibility that Congress intended this limitless result in a criminal statute creates an ambiguity regarding the meaning of just who "receives . . . benefits . . . under a Federal Program," within the meaning of section 666(b).

Like other courts that have wrestled with an interpretation of section 666(b), we look to the legislative history and the underlying purpose of the statute for guidance. *See United States v. Copeland*, 143 F.3d 1439, 1441 (11th Cir.1998); *United States v. Rooney*, 37 F.3d 847, 850-51 (2d Cir.1994); *United States v. Wyncoop*, 11 F.3d 119, 121 (9th Cir.1993). The legislative history reveals that although Congress intended "federal programs" to be broadly construed, Congress also intended to limit the statute to be consistent with its underlying purpose to "protect the integrity of the vast sums of money distributed through federal programs from theft, fraud, and undue influence by bribery." S.Rep. No. 95-225, at 370 (1984), *reprinted in* 1984 U.S.C.C.A.N. 3182, 3511. As further explained by our sister circuit, the purpose of section 666 is

> to prevent diversions of federal funds not only by agents of organizations that are direct beneficiaries of federal benefits funds, but by agents of organizations to whom such funds are

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> *"[r]eally, universally, relations stop nowhere,"* H. James, Roderick Hudson xli (New York ed., World's Classics 1980). But that, of course, would be to read Congress's words of limitation as mere sham. . . .

Id. at 655, 115 S.Ct. 1671 (emphasis added).

> 'disbursed' for further 'distribut[ion]' to or for the benefit of the individual beneficiaries.

United States v. Zyskind, 118 F.3d 113, 116 (2d Cir.1997).

When Congress enacted section 666, it cited three cases that represent the types of situations section 666 was intended to cover. See S.Rep. No. 95-225, at 370 nn. 2 & 3, *reprinted in* 1984 U.S.C.C.A.N. at 3182, 3511 nn. 2 & 3; *see also Salinas*, 552 U.S. at ___, 118 S.Ct. at 474 (discussing legislative history). In all three cases, the organization in question received federal program funds as the intended recipient, and each was charged with the responsibility for administering or spending the federal grant monies to benefit the intended beneficiaries. In *United States v. Del Toro*, 513 F.2d 656, 661 (2d Cir.1975), the Harlem-East Harlem Model Cities Program (Model Cities) received funds for revitalization projects in inner city areas. Model Cities had the responsibility to administer and disburse funds to benefit the communities. In *United States v. Hinton*, 683 F.2d 195, 196 (7th Cir.1982), United Neighborhoods, Inc. (UNI) entered into contracts with the city of Peoria, Illinois, to administer federal funds under a Community Development Block Grant from HUD. The intended beneficiary, again, was the community and UNI was charged with the administration and disbursement of federal funds to benefit that community. In *United States v. Mosley*, 659 F.2d 812, 813 (7th Cir.1981), the State of Illinois Bureau of Employment Security as part of the Comprehensive Employment and Training Program administered employment and training programs for the unemployed, the intended beneficiaries. The Bureau received the funds and had the responsibility to administer them to benefit the unemployed. None of the cases

represent a situation where the beneficiary had already received the benefits.

The purpose of section 666 to prevent the diversion of federal program funds on the distribution path to the intended beneficiaries is fulfilled once the funds have been received by the actual beneficiary. Cases interpreting section 666(b) support this conclusion. In *U.S. v. Wyncoop,* 11 F.3d 119, a private college participated in federal student loan programs. The issue was whether the college's receipt of tuition payments funded by the loans qualified as receipt of benefits under section 666. In the program, the government guaranteed the student's loan and a private bank then issued a check, often jointly to the student and the college. The student was the intended beneficiary of the loans. The college had no responsibility to administer or disburse the funds to the student. The court held that "the statute was not intended to cover thefts from institutions like Trend College that do not themselves receive and administer federal funds." *Id.* at 122.

In both *Wyncoop* and the instant case, the beneficiary had discretionary rights to the money. Although the court in *Wyncoop* did not emphasize the fact, we believe it was important to the outcome of the case that the checks were issued either to the students or jointly to the students and the school. The loans were thus made to the students and passed on to the college in the form of tuition payments. As such, the court's ultimate determination that the college did not receive "benefits" within the meaning of section 666(b) is consistent with our conclusion in this case. Here, the private insurance company administering

the Medicare benefits issued a check to the BVMG physician only after an assignment of the fees by the patient to the physician.

In *U.S. v. Zyskind,* 118 F.3d 113, the issue was whether an adult home that received federal funds as a contracted fiduciary thereby received a benefit within the meaning of section 666(b). The home, Hi-Li, served handicapped or mentally impaired adults. Most of the residents received federal benefits from either the Social Security Administration or the Department of Veterans Affairs. The statutory scheme envisioned that the federal funds could be paid to a caretaker or custodian in a fiduciary capacity for the benefit of the veteran. *Id.* at 115. Under that scheme, some benefit checks were made payable directly to the Hi-Li administrator as legal custodian of the veteran. The court held that since the funds reached Hi-Li before the veterans and Hi-Li was required to administer the funds on behalf of these intended beneficiaries, Hi-Li fell within section 666 jurisdiction. *Id.* at 117.

Zyskind is distinguishable from the instant case. There, Hi-Li received the money directly and was charged with a fiduciary responsibility to use the money for the benefit of the intended beneficiary, the resident. True to the purposes of section 666 to protect federal funds enroute to the beneficiary, the court upheld section 666 coverage over Hi-Li. By contrast, BVMG was merely accepting each patient's payment by voluntary assignment for services already rendered. BVMG had no power

or duty to administer or disburse the funds further to the benefit of its Medicare patients.[7]

We conclude that Congress intended the reference in section 666(b) to an organization receiving federal program benefits to mean one that receives benefits before final distribution to the intended beneficiary, here the patient. What happens to the funds once the patient receives them is beyond the scope of section 666. Thus, any assignment of such funds to a third party does not constitute a receipt of federal program benefits within the reach of section 666. We are not persuaded it was Congress's intent in enacting section 666(b) to follow the intended beneficiaries' further distribution of the federal benefits. As a result, we hold that BVMG falls outside the scope of section 666.

We **AFFIRM** the district court.

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[7] The government argues that "basing statutory coverage on whether federal payments are for past or future services . . . has been rejected as 'frivolous.' " Br. of Aplt. at 20 (citing *Baylor University*, 736 F.2d at 1048). What the government ignores is that *Baylor University* was a civil case and involved Medicare Part A. Medicare Part A is a different scheme where all payments to the hospitals are direct, without the voluntary choice of the patient. We need *not* decide whether the scope of section 666 would extend to such a case.

Supreme Court, U.S.
FILED
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(2)

No. 99-116

In the Supreme Court of the United States

JEFFREY ALLAN FISCHER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether a hospital that receives annual payments of between $10 and $15 million under the Medicare program is an "organization, government, or agency [that] receives * * * benefits in excess of $10,000 under a federal program involving * * * federal assistance" within the meaning of 18 U.S.C. 666(b).

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1-15) is reported at 168 F.3d 1273.

JURISDICTION

The judgment of the court of appeals was entered on March 4, 1999. A petition for rehearing was denied on April 28, 1999 (Pet. App. 16). The petition for a writ of certiorari was filed on July 15, 1999. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Middle District of Florida, petitioner was convicted on one count of fraud involving an organization receiving federal funds, in violation of 18 U.S.C.

666(a)(1)(A) and 2 (count 1); one count of giving a kickback to an agent of an organization receiving federal funds, in violation of 18 U.S.C. 666(a)(2) and 2 (count 2); one count of mail fraud, in violation of 18 U.S.C. 1341 (count 3); two counts of wire fraud, in violation of 18 U.S.C. 1343 (counts 4-5); one count of conspiracy to commit the above offenses, in violation of 18 U.S.C. 371 (count 6); and seven counts of money laundering, in violation of 18 U.S.C. 1957 (counts 7-13). He was sentenced to 65 months' imprisonment, to be followed by three years of supervised release. He was ordered to pay $1.2 million in restitution. The court of appeals affirmed. Pet. App. 1-15.

1. Petitioner was president and a partial owner of QMC, a private company that performed billing audits for health care providers. In 1993, he arranged for QMC to obtain a $1.2 million loan from West Volusia Hospital Authority (WVHA). WVHA is a county agency responsible for operating two hospitals. In 1993, it received between $10 and $15 million in payments under the Medicare program. Pet. App. 3, 7.

As security for the $1.2 million loan from WVHA, petitioner pledged QMC's accounts receivable and a $1 million letter of credit that QMC had obtained through a foreign bank, First Asia Development Bank. QMC's accounts receivable, however, had already been pledged to another QMC creditor, and the terms of the $1 million letter of credit severely limited WVHA's ability to collect on it. Petitioner negotiated the loan with WVHA's chief financial officer, Robert Caddick. Pet. App. 3.

Petitioner used the $1.2 million to repay creditors and to raise the salaries of QMC's five owner-employees, including petitioner. Petitioner also had QMC lend at least $100,000 to a company owned by the

First Asia Development Bank representative who had assisted QMC with the $1 million letter of credit. In addition, petitioner used the loan proceeds by causing QMC to open options-trading accounts, which lost about $400,000. Pet. App. 4.

After the loan was made, QMC paid $10,000 to Caddick's mother, Stella Greenfield, by a check marked "consulting fees," even though Greenfield had never performed services for QMC. Greenfield later sent the check proceeds to Caddick. Petitioner noted on the check's invoice that the check was for a "loan origination fee." Pet. App. 5. Caddick later tried to cover up QMC's $10,000 payment to him by proposing to QMC's vice president, Charles Kramer, that he backdate a bogus "contract" for programming services that Caddick had allegedly performed for QMC. *Id.* at 6.

When QMC was unable to repay the loan on its due date, petitioner persuaded First Asia Development Bank to send QMC a $1.2 million draft, which QMC endorsed and presented to WVHA. First Asia, however, refused to honor the draft when WVHA's bank presented it. Pet. App. 4-5. In December 1994, petitioner was removed from his position as president of QMC. The next month, QMC filed for bankruptcy. Pet. App. 6; Gov't C.A Br. 17.

2. The court of appeals affirmed petitioner's conviction. Pet. App. 1-15.[1] The court of appeals rejected

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[1] The court of appeals rejected petitioner's challenges to the sufficiency of the evidence, the particularity of the indictment, the admission of petitioner's prior fraud convictions, the prosecutor's statements to the jury, the district court's refusal to hold an evidentiary hearing regarding an alleged *Brady* violation, and the district court's finding that petitioner had the ability to pay restitution. Pet. App. 2 n.2. Petitioner does not challenge those rulings in this Court.

petitioner's contention that the government had failed to prove under 18 U.S.C. 666(b) that the organization affected by the defendant's prohibited acts under Section 666(a) "receives, in any one year period, benefits in excess of $10,000 under a Federal program involving a grant, contract, subsidy, loan, guarantee, insurance, or other form of Federal assistance."[2] The court of appeals explained that, under the plain terms of Section 666(b), "the 'benefits' an organization receives under a federal program can be in the form of 'a grant, contract, subsidy, loan, guarantee, insurance, or other form of Federal assistance.'" Pet. App. 11 (quoting 18 U.S.C. 666(b)). The court of appeals further explained that, in 1993, WVHA received between $10 and $15 million under the Medicare program for providing health care services to covered individuals. *Ibid.* The court thus concluded that, "[b]ecause WVHA received payments under a federal assistance program, WVHA received a type of 'benefits' expressly covered by § 666(b)." *Ibid.*

The court of appeals (Pet. App. 12-15) further rejected petitioner's reliance on *United States* v. *LaHue*, 998 F. Supp. 1182 (D. Kan. 1998).[3] In *LaHue*, the district court concluded that Section 666(b) did not apply to a group of physicians that received payments

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[2] Section 666 (18 U.S.C.) provides, in pertinent part:

Theft or bribery concerning programs receiving federal funds.

(a) Whoever, if the circumstance described in subsection (b) of this section exists—

(1) being an agent of an organization, or of a State, local, or Indian tribal government, or any agency thereof—

(A) embezzles, steals, obtains by fraud, or otherwise without authority knowingly converts to the use of any person other than the rightful owner or intentionally misapplies, property that—

(i) is valued at $5,000 or more, and

(ii) is owned by, or is under the care, custody, or control of such organization, government, or agency; or

(B) corruptly solicits or demands for the benefit of any person, or accepts or agrees to accept, anything of value from any person, intending to be influenced or rewarded in connection with any business, transaction, or series of transactions of such organization, government, or agency involving any thing of value of $5,000 or more; or

(2) corruptly gives, offers, or agrees to give anything of value to any person, with intent to influence or reward an agent of an organization or of a state, local or Indian tribal government, or any agency thereof, in connection with any business, transaction, or series of transactions of such organization, government, or agency involving anything of value of $5,000 or more;

shall be fined under this title, imprisoned not more than 10 years, or both.

(b) The circumstance referred to in subsection (a) of this section is that the organization, government, or agency receives, in any one year period, benefits in excess of $10,000 under a Federal program involving a grant, contract, subsidy, loan, guarantee, insurance, or other form of Federal assistance.

(c) This section does not apply to bona fide salary, wages, fees, or other compensation paid, or expenses paid or reimbursed, in the usual course of business.

[3] After the court of appeals issued its decision in this case, the Tenth Circuit affirmed the district court's decision in *LaHue*. *United States* v. *LaHue*, 170 F.3d 1026 (1999) (Pet. App. 18-32).

under Part B of the Medicare program, because the physicians' patients, rather than the physicians themselves, are the intended beneficiaries of the Medicare program and the physicians received Medicare payments solely because the patient beneficiaries had assigned their right to receive Medicare payments to the physicians. Pet. App. 12-14 (citing 998 F. Supp. at 1186-1192).

In "declin[ing] to adopt *LaHue*'s 'target recipient' analysis," the court of appeals observed that, because the record "did not clearly establish whether WVHA received funds directly from the Medicare program or received funds as an assignee under Part B or even Part A of the federal program[,] * * * there is a possibility in this case that WVHA received funds directly from the Medicare program without having been assigned the right to receive those funds by a patient." Pet. App. 14. The court further stated that, "even if WVHA received funds as an assignee, the plain language of § 666(b) does not distinguish between an organization, government, or agency that receives 'benefits' directly under a federal program and an organization, government, or agency that receives 'benefits' as an assignee under a federal program." *Ibid.* The court similarly concluded that the language of Section 666(b) does not require that the receiving organization be the "target recipient" of the federal assistance program. *Ibid.*

ARGUMENT

1. Petitioner contends (Pet. 6-16) that the millions of dollars in Medicare payments that WVHA received in 1993 are not "benefits * * * under a federal program involving * * * federal assistance" within the meaning of 18 U.S.C. 666(b), because WVHA is not the beneficiary of the Medicare program and does not administer Medicare funds. That contention is incorrect, and it does not warrant this Court's review.

Section 666(b) encompasses any "organization, government, or agency [that] *receives*, in any one year period, benefits in excess of $10,000 under a Federal program involving a grant, contract, subsidy, loan, guarantee, insurance, or other form of Federal assistance." 18 U.S.C. 666(b) (emphasis added). That language is "expansive" and "unqualified." *Salinas* v. *United States*, 522 U.S. 52, 56 (1997). The plain text of Section 666(b) does not require that the recipient of federal assistance be the intended or ultimate beneficiary of a federal program, or that the recipient administer federal funds on behalf of the government. All that is required under the provision is that the entity receive benefits under a federal assistance program in one year in an amount exceeding $10,000.

As the court of appeals explained, Section 666(b) "focuses on the source of the 'benefits', requiring that the 'benefits' have been received '*under*' a Federal program *involving* a grant, contract, subsidy, loan, guarantee, insurance, or other form of *Federal assistance*." Pet. App. 14 (quoting 18 U.S.C. 666(b)). The court of appeals therefore correctly concluded that, "in context, the use of the term 'benefits' serves to emphasize not that the recipient must be a 'target recipient', but rather that the funds must have been

received by the organization, government, or agency as part of an 'assistance' program, rather than a purely commercial transaction." *Id.* at 14-15; see also *United States* v. *Zyskind*, 118 F.3d 113, 116 (2d Cir. 1997) ("Nothing in the language of § 666 suggests that its reach is limited to organizations that were the direct beneficiaries of federal funds. The jurisdictional subsection, (b), uses the word 'receives,' rather than the phrase 'is a beneficiary of.'"). Because WVHA directly received between $10 and $15 million in payments under the Medicare program, a federal assistance program, the court of appeals correctly concluded that WVHA is an agency covered by Section 666(b).[4]

2. a. Petitioner argues (Pet. 6-12) that the decision below conflicts with *United States* v. *LaHue*, 170 F.3d 1026 (10th Cir. 1999), which held that Section 666(b) does not apply to a group of physicians who received

[4] Petitioner suggests (Pet. 10-12) that, because hospitals are reimbursed under the Medicare program for providing services to eligible patients, the payments to WVHA are excluded under 18 U.S.C. 666(c), which provides that "[t]his section does not apply to bona fide salary, wages, fees, or other compensation paid, or expenses paid or reimbursed, in the usual course of business." Petitioner does not raise, however, any issue under subsection (c) as a question presented, see Pet. i, and no such issue was addressed by the court of appeals. In any event, even assuming that subsection (c) does more than exempt routine business payments to individuals from the types of improper actions or inducements prohibited by Section 666(a)(1)(B) and (a)(2), subsection (c) would not help petitioner here. The complex statutory scheme of reimbursing hospitals under the Medicare program does not fall within the type of payments for individual services or expenses enumerated in Section 666(c). No court has held to the contrary. Cf. *LaHue*, 170 F.3d at 1029 n.5 (Pet. App. 26 n.5) (declining to address the applicability of subsection (c) to Medicare Part B payments to doctors).

funds through patient assignments of benefits under Part B of the Medicare program. See Pet. App. 18-32. The decision in *LaHue* does disagree with that aspect of the court of appeals' reasoning that concluded that "the plain language of § 666(b) does not distinguish between an organization, government, or agency that receives 'benefits' directly under a federal program and an organization, government, or agency that receives 'benefits' as an assignee under a federal program." Pet. App. 14. But that issue does not warrant resolution by this Court at the present time.

As the court of appeals explained, the record does not reveal whether WVHA received Medicare payments directly from the Medicare program or as an assignee from hospital patients. Pet. App. 14. Thus it is not clear that the factual scenario at issue in *LaHue*—physicians receiving payments through patient assignments under Medicare Part B—is present in this case. WVHA is a hospital, and the Medicare program directly reimburses hospitals for their in-patient services and related post-hospital services under Part A of Medicare. See 42 U.S.C. 1395c to 1395i-4 and 42 C.F.R. 409.5; see also *LaHue*, 170 F.3d at 1027 n.3 (Pet. App. 22 n.3) ("[p]ayment by Medicare under Part A for services rendered by a hospital * * * may only be made to the institution"), and 170 F.3d at 1031 n.7 (Pet. App. 32 n.7) ("Medicare Part A is a different scheme [from Part B] where all payments to the hospitals are direct, without the voluntary choice of the patient. We need *not* decide whether the scope of section 666 would extend to such a case.").

In any event, any inconsistency between the two decisions does not raise a question of sufficient importance to require this Court's intervention. No other court of appeals has considered the precise issue pre-

sented in this case. Furthermore, the issue has limited practical significance. Fraud involving organizations that receive Medicare funds ordinarily may be prosecuted under other federal criminal statutes, such as mail or wire fraud, 18 U.S.C. 1341, 1343; the Medicare anti-kickback statute, 42 U.S.C. 1320a-7b; or the statute prohibiting theft or embezzlement in connection with health care, 18 U.S.C. 669 (Supp. III 1997). Indeed, the government in this case successfully prosecuted petitioner under the mail and wire fraud statutes in addition to Section 666. Pet. App. 1-2 n.1. Likewise, the defendants in *LaHue* were separately prosecuted for the same conduct under the Medicare anti-kickback statute, 42 U.S.C. 1320a-7b, which prohibits certain payments for Medicare patient referrals. See *LaHue*, 170 F.3d at 1027 n.2 (Pet. App. 21 n.2).

b. Petitioner also claims (Pet. 13-16) that the decision below "[i]s [a]rguably [i]n [c]onflict" (Pet. 13) with *United States* v. *Zyskind*, *supra*, and *United States* v. *Wyncoop*, 11 F.3d 119 (9th Cir. 1993). Neither of those decisions, however, conflicts with the court of appeals' decision in this case.

In *Zyskind*, 118 F.3d at 115, the Second Circuit *rejected* the defendant's contention that Section 666(b) "does not apply with respect to organizations that are not direct beneficiaries of federal government benefits." Moreover, although the Second Circuit noted that Section 666(b) applies to organizations that administer federal funds or distribute such funds to their intended beneficiaries, *id.* at 116-117, the court did not suggest that the statute was limited to only those organizations, or would not apply to Medicare providers which directly receive federal funds.

In *Wyncoop*, the Ninth Circuit held that Section 666(b) did not apply to a private college that "never

received any federal funds under [student] loan programs," but "received only the indirect benefits associated with increased enrollment of students receiving private loans induced by federal guarantees to the private lenders." 11 F.3d at 122. By contrast, WVHA in the present case directly received $10-$15 million in Medicare payments. Pet. App. 7.[5]

3. Petitioner also contends (Pet. 6) that the court of appeals' decision is contrary to "the fundamentals of federalism," because the court's interpretation of Section 666(b) makes petitioner's theft and bribery involving a local hospital a federal crime. That contention lacks merit.

The purpose of Section 666 is "to protect the integrity of the vast sums of money distributed through Federal programs from theft, fraud, and undue influence by bribery." S. Rep. No. 225, 98th Cong., 2d Sess. 369-370 (1984). In holding that Section 666(a)(1)(B) does not require the government to demonstrate that the prohibited bribe affects federal funds, this Court in *Salinas*, *supra*, concluded that the acceptance of bribes by officials of a jail housing federal

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[5] Petitioner also errs in suggesting (Pet. 9-10) that the decision below conflicts with *United States* v. *Copeland*, 143 F.3d 1439, 1441 (11th Cir. 1998), which held that a defense contractor, Lockheed, was not covered by Section 666(b) because Lockheed was "engaged in purely commercial transactions with the federal government." As the court of appeals explained, "[t]he evidence in the present case contrasts sharply with that in *Copeland*. Whereas Lockheed received federal dollars through purely commercial transactions, WVHA * * * actually received payments from the federal government under several assistance programs." Pet. App. 11. In any event, any disagreement between the court of appeals' decision below and its decision in *Copeland* would not warrant this Court's review. *Wisniewski* v. *United States*, 353 U.S. 901, 901-902 (1957) (per curiam).

prisoners pursuant to an agreement with the federal government "was a threat to the integrity and proper operation of the federal program" and does not "extend federal power beyond its proper bounds." *Salinas*, 522 U.S. at 61.

Similarly here, petitioner's conduct in obtaining a loan from a Medicare provider by fraud and giving a kickback to one of the provider's agents threatened the integrity of the Medicare program. See also Pet. App. 11-12 ("our determination that WVHA is an agency receiving 'benefits' within the meaning of § 666(b) serves the statute's purpose of protecting from fraud, theft, and undue influence by bribery the money distributed to health care providers, and WVHA in particular, through the federal Medicare program and other similar federal assistance programs"). The court of appeals' interpretation of Section 666(b) therefore does not "extend federal power beyond its proper bounds." *Salinas*, 522 U.S. at 61; see also *Westfall* v. *United States*, 274 U.S. 256, 258- 259 (1927) (Holmes, J.) (upholding constitutionality of statute criminalizing misapplication of funds of state banks belonging to Federal Reserve System).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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SEPTEMBER 1999

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CLERK

In The

Supreme Court of the United States

JEFFREY ALLAN FISCHER,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

JOINT APPENDIX

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Petition For Certiorari Filed July 15, 1999
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RELEVANT DOCKET ENTRIES

U.S. District Court
Middle District of Florida (Orlando)

* * *

12/7/95	1	INDICTMENT as to Jeffrey Allan Fischer – counts 1-6. (slz) [Entry date 12/13/95]

* * *

6/12/96	51	SUPERSEDING INDICTMENT – counts 1s, 2s, 3s, 4s-5s, 6s, 7s-13s. (nrs) [Entry date 06/12/96]

* * *

6/17/96	55	NOTICE OF ARRAIGNMENT on Superseding Indictment: Set arraignment on Superseding Indictment for 11:30 6/26/96 before Magistrate Judge David A. Baker. (nrs) [Entry date 06/17/96]

* * *

6/26/96	60	ARRAIGNMENT on Superseding Indictment held on 06/26/96 Defendant pled not guilty before Magistrate Judge David A. Baker. Defense counsel requests additional time to file discovery motions as they relate to the superseding indictment. Court instructs defense counsel to file any motions as soon as possible. Tape 96-55 (3875-4055) (nrs) [Entry date 06/27/96]

* * *

7/15/96	80	JURY TRIAL (1st DAY) before Judge Anne C. Conway held on 07/15/96. Court Reporter: Rita Meyer (nrs) [Entry date 07/16/96]

* * *

7/16/96 83 JURY TRIAL (2nd DAY) before Judge Anne C. Conway held on 07/16/96. Court Reporter: Rita Meyer (nrs) [Entry date 07/17/96]

* * *

7/17/96 85 JURY TRIAL (3rd DAY) before Judge Anne C. Conway held on 07/17/96. Court Reporter: Rita Meyer (nrs) [Entry date 07/18/96]

* * *

7/18/96 87 JURY TRIAL (4th DAY) before Judge Anne C. Conway held on 07/18/96. Court Reporter: Rita Meyer (nrs) [Entry date 07/19/96]

* * *

7/18/96 94 JURY VERDICT: Guilty as to Counts 1s, 2s, 3s, 4s-5s, 6s, 7s-13s. (nrs) [Entry date 07/19/96]

* * *

10/25/96 111 SENTENCING before Judge Anne C. Conway. Counts 1s, 2s, 3s, 4s-5s, 6s, 7s-13s: 65 months imprisonment; 3 years supervised release; 100 hours community service, participate in a program of mental health treatment and contribute to costs of such program; $1,200,000.00 restitution jointly and severally with others ordered to pay back this amount; $650 special assessment, Counts 1-2, 3, 4-5, 6: DISMISSED. Fine and costs of imprisonment/supervision waived. Defendant shall surrender to designated

institution on or before 2:00 p.m. between 01-02-97 and 01-09-97. Court Reporter: Rita Meyer (nrs) [Entry date 10/28/96]

* * *

11/4/96 115 NOTICE OF APPEAL appealing [114-1] judgment order FILING FEE $105.00 RECEIPT #63406 Certificate of Readiness due on 11/19/96 for Jeffrey Allan Fischer (rdo) [Entry date 11/08/96]

* * *

4/16/97 124 MOTION with memorandum in support by Jeffrey Allan Fischer for new trial, request for oral argument and evidentiary hearing. (maa) [Entry date 04/16/97]

* * *

7/8/97 130 ORDER denying [124-1] motion for new trial and [124-2] motion request for oral argument and evidentiary hearing; granting [26-1] motion to supplement the record. (Signed by Judge Anne C. Conway) (map) [Entry date 07/09/97]

* * *

7/18/97 132 NOTICE OF APPEAL appealing [130-1] order FILING FEE $105.00 RECEIPT #66021 Certificate of Readiness due on 8/4/97 for Jeffrey Allan Fischer (rdo) [Entry date 07/18/97]

* * *

11/25/97 139 MOTION with memorandum in support by Jeffrey Allan Fischer for new trial,

Request for Oral Argument and Evidentiary Hearing. (rdo) [Entry date 11/28/97]

* * *

1/6/98 142 ORDER as to Jeffrey Allan Fischer denying [139-1] motion for new trial; denying [138-1] motion renewed motion for bond pending appeal. (Signed by Judge Anne C. Conway) (rdo) [Entry date 01/06/98]

1/16/98 143 NOTICE OF APPEAL appealing [142-1] order FILING FEE $105.00 RECEIPT #67951 Certificate of Readiness due on 2/2/98 for Jeffrey Allan Fischer (rdo) [Entry date 01/16/98]

* * *

United States Court of Appeals for the Eleventh Circuit

DKT# 96-3587

8. OPINION INFORMATION - Pub XX

3/4/99* Opinion Issued

[XXX] Affirmed

FMH Signed

*Opinion filed in 96-3587, 972877 & 98-2091

9. JUDGMENT AND MANDATE INFORMATION

3/4/99 Judgment Entered

10. REHEARING INFORMATION

3/24/99ar Petition for Rehearing 3/25/99(J)

Apt X Panel X En Banc X

DKT# 97-2877

8. OPINION INFORMATION - Pub XX

3/4/99* Opinion Issued

[XXX] Affirmed

FMH Signed

*Opinion filed in 96-3587, 972877 & 98-2091

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3/4/99* Opinion Issued

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FMH Signed

*Opinion filed in 96-3587, 972877 & 98-2091

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10. REHEARING INFORMATION

3/24/99ar Petition for Rehearing 3/25/99(J)

Apt X Panel X En Banc X

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

UNITED STATES OF AMERICA	No. 95-239-Cr-Orl-22(S1)
	18 U.S.C. § 666(a)(1)(A)
v.	18 U.S.C. § 666(a)(2)
	18 U.S.C. § 1341
JEFFREY ALLAN FISCHER	18 U.S.C. § 1343
	18 U.S.C. § 371
	18 U.S.C. § 1957
	18 U.S.C. § 982 – Forfeiture
	(Filed June 12, 1996)

The Grand Jury charges:

COUNT ONE

[Fraud Involving Organization Receiving Federal Funds]

The Entities and Individuals

1. At all times material to this Indictment, the West Volusia Hospital Authority ("WVHA") was a special taxing district of the State of Florida established pursuant to Fla. Stat. Ann. Chapter 189, to provide health care services to the citizens of Volusia County, Florida.

2. At all times material to this Indictment, WVHA was:

a. a "unit of local government" within the meaning of Fla. Stat. Ann. § 218.31(1);

b. an "organization" within the meaning of 18 U.S.C. § 666(a); and

c. a local "government agency" within the meaning of 18 U.S.C. § 666(d)(2), specifically an "authority" established and subject to control by a government or governments for the execution of a governmental or intergovernmental program.

3. WVHA received in a one-year period, specifically between October 1, 1992 and September 30, 1993, benefits in excess of $10,000 under a federal program involving a grant, contract, subsidy, loan guarantee, insurance, and other forms of federal assistance, including, but not limited to, Medicare, Medicaid, CHAMPUS, and Veterans Administration payments.

4. At all times material to this Indictment, Quality Medical Consultants, Inc. ("QMC") was a Florida corporation with its principal place of business in Orlando, Florida. For a contingent fee, QMC reviewed hospital billings and accounts receivable, and advised hospitals on means of increasing their billings and collections for medical care.

5. At all times material to this Indictment, JEFFREY ALLAN FISCHER ("FISCHER") was the President and Chief Executive Officer of QMC.

6. At all times material to this Indictment, Robert Caddick ("Caddick") was the Chief Financial Officer of WVHA. Caddick was an "agent," "officer," and "employee" of WVHA, and a person authorized to act on behalf [sic] WVHA, within the meaning of 18 U.S.C. § 666(d)(1).

The Charge

7. Beginning on or about January 1, 1993 and continuing through on or about November 30, 1995, in Volusia, Seminole, and Orange Counties, Florida, in the Middle District of Florida, and elsewhere,

JEFFREY ALLAN FISCHER

the defendant herein, knowingly and intentionally obtained by fraud, and otherwise without authority knowingly converted to the use of a person other than the rightful owner, $1.2 million in money owned by, and under the care, custody, and control of WVHA.

All in violation of Title 18, United States Code, Sections 666(a)(1)(A) and 2.

COUNT TWO

[Kickback Involving Organization Receiving Federal Funds]

1. Paragraphs 1 through 6 of Count One are realleged and incorporated as if fully set forth in this paragraph.

2. Beginning on or about January 1, 1993 and continuing through on or about November 30, 1995, in Volusia, Seminole, and Orange Counties, Florida, in the Middle District of Florida, and elsewhere,

JEFFREY ALLAN FISCHER

the defendant herein, knowingly, intentionally, and corruptly gave, offered, and agreed to give $10,000 to Caddick and Caddick's mother, with intent to influence and reward Caddick, an agent of WVHA, in connection with a transaction of WVHA involving $1.2 million.

All in violation of Title 18, United States Code, Sections 666(a)(2) and 2.

COUNT THREE

[Mail Fraud]

1. Paragraphs 1, 4, 5, and 6 of Count One are realleged and incorporated as if fully set forth in this paragraph.

The Scheme and Artifice to Defraud

2. Beginning on or about January 1, 1993 and continuing through on or about November 30, 1995, in Volusia, Seminole, and Orange Counties, Florida, in the Middle District of Florida, and elsewhere, defendant FISCHER and Caddick devised and intended to devise, a scheme and artifice to defraud WVHA out of money, and to obtain such money by means of false and fraudulent pretenses, representations, and promises, and the concealment of materia! facts.

3. In 1993 QMC was in debt and unable to obtain capital from banks. It was part of the scheme to defraud that FISCHER and Caddick agreed that FISCHER would cause QMC to pay Caddick and Caddick's mother a

$10,000 kickback or gratuity, and that Caddick would cause WVHA to loan $1.2 million to QMC.

4. It was also part of the scheme to defraud that FISCHER caused QMC to post as security for the loan a bogus letter of credit for $1.2 million purportedly issued by First Asian Development Bank ("FADB") of Vanuatu, a Pacific island.

5. It was part of the scheme and artifice to defraud that FISCHER and Caddick knowingly and intentionally made statements and caused the distribution of documents which they knew contained false and fraudulent representations and promises in order to induce WVHA to pay $1.2 million to QMC, and to conceal the purpose of the $10,000 payment to Caddick and Caddick's mother. The false and fraudulent representations and promises included the following, which FISCHER and Caddick then and there well knew to be false:

a. That on or about June 30, 1993, FISCHER executed a letter of agreement with Caddick in which FISCHER pledged the accounts receivable of QMC, which FISCHER knew were previously pledged to Physicians Medical Reviewers, Inc.

b. In or about June 1993, Caddick showed a draft letter of credit to be issued by FADB to managing directors of WVHA in order to gain approval for the $1.2 million loan to QMC, when Caddick knew that such a loan was illegal under Florida law; Caddick did not disclose this fact to the managing directors that he showed the draft letter of credit to.

c. On or about August 25, 1993, FISCHER completed a QMC check request/voucher payable to Stella Greenfield in the amount of $10,000, reflecting that the payment was for consulting fees, when FISCHER knew that Stella Greenfield had not performed such work.

d. In or about January 1994, FISCHER submitted an invoice dated August 1, 1993 (Invoice No. 93-01) prepared by Caddick, to QMC's accounting department, which reflected that Stella Greenfield had rendered services to QMC, when FISCHER knew that Stella Greenfield had performed no such services.

e. On or about June 27, 1994, FISCHER caused a draft in the amount of $1.2 million from European American Capital Corp. ("EACC") to be delivered to QMC with instructions for the draft to be endorsed and made payable to WVHA, when FISCHER knew that the draft would not be paid by FADB.

f. In or about October 1994, Caddick asked Charles Kramer to sign a backdated letter of agreement which showed that Caddick was due payment for marketing a computer program for QMC in order to justify the $10,000 payment made to Caddick and Caddick's mother, when Caddick knew that he was not due any money under the letter of agreement because the computer program was never marketed.

6. In truth and fact, as FISCHER and Caddick then and there well knew, the money that WVHA paid to QMC was to be used to pay a kickback or gratuity to Caddick, and was to be used for the enrichment of FISCHER and Caddick and parties having a relationship with FISCHER and Caddick and otherwise.

7. Shortly after receipt of the $1.2 million loan, FISCHER caused QMC to substantially increase the salaries of the QMC officers, including FISCHER, and to further disburse the $1.2 million as follows:

PAYEE	AMOUNT
Internal Revenue Service	$ 70,912.42
Olde Discount stockbrokers	$ 325,000.00
Barnett Securities, Inc.	$ 303,000.00
Tarpel Music	$ 75,000.00
Bill and Stephanie Norvell	$ 60,000.00
FADB Resources (HK) Ltd.	$ 48,000.00
CKJF, Inc.	$ 48,904.48
Homer N. Allen	$ 31,402.89
Barnett Bank	$ 121,170.14
Physicians Medical Reviewers, Inc.	$ 72,765.38
TOTAL	$1,277,325.45

The Mailing

8. On or about the date listed below, in Volusia, Seminole, and Orange Counties, Florida, in the Middle District of Florida, and elsewhere, for the purpose of executing and attempting to execute the above scheme and artifice to defraud, and to obtain money and property by means of false and fraudulent pretenses, representations, and promises,

JEFFREY ALLAN FISCHER

the defendant herein, did knowingly cause to be sent and delivered by the United States mail, and did knowingly cause to be taken and received from the United States mail, the following matter and thing:

Count	Date	Matter/Address	From
Three	9/3/93	$10,000 check payable to Stella Greenfield, 14507 South Kolin Avenue, Midlothian, IL 60445	JEFFREY FISCHER 5104 Orange Blossom Trail Suite 103 Orlando, FL 32810

All in violation of Title 18, United States Code, Sections 1341 and 2.

COUNTS FOUR AND FIVE

[Wire Fraud]

1. Paragraphs 1, 4, 5, and 6 of Count One and Paragraphs 2 through 4 of Count Three are realleged and incorporated as if fully set forth in this paragraph.

2. On or about the dates listed below, in Volusia, Seminole, and Orange Counties, Florida, in the Middle District of Florida, and elsewhere, for the purpose of executing and attempting to execute the above scheme and artifice to defraud and to obtain money and property by means of false and fraudulent pretenses, representations, and promises,

JEFFREY ALLAN FISCHER

the defendant herein, did knowingly transmit and cause to be transmitted in interstate and foreign commerce, by means of a wire communication, certain signs, signals, and sounds, that is:

Count	Date	Wire/To	From
Four	6/23/93	Telex purporting to be letter of credit to QMC, Orlando, FL	Sigma Alpha, Philadelphia, PA
Five	7/13/93	$48,000 wire transfer to FADB, Hong Kong	Barnett Bank, Orlando, FL

All in violation of Title 18, United States Code, Sections 1343 and 2.

COUNT SIX

[Conspiracy]

1. Paragraphs 1 through 6 of Count One and Paragraphs 2 through 4 of Count Three are realleged and incorporated as if fully set forth in this paragraph.

The Conspiracy and its Objects

2. Beginning on or about January 1, 1993, and continuing through on or about November 30, 1995, in Volusia, Seminole, and Orange Counties, Florida, in the Middle District of Florida, and elsewhere,

JEFFREY ALLAN FISCHER

the defendant herein, knowingly and wilfully conspired and agreed with other persons both known and unknown to the Grand Jury, to commit the following offenses against the United States:

a. To knowingly and intentionally obtain by fraud, and otherwise without authority knowingly convert to the use of a person other than the rightful owner, money owned by, and under the care, custody, and control of an organization and government agency, in violation of 18 U.S.C. § 666(a)(1)(A);

b. To corruptly give, offer, and agree to give money with intent to influence or reward an agent of an organization and government agency in connection with a transaction, in violation of 18 U.S.C. § 666(a)(1)(B);

c. To corruptly solicit and demand for the benefit of a person, and accept and agree to accept money intending to be influenced and rewarded in connection with a transaction, in violation of 18 U.S.C. § 666(a)(2);

d. To knowingly cause to be sent and delivered by the United States mail, and knowingly cause to be taken and received from the United States mail, certain matters for the purpose of executing a scheme and artifice to defraud, and for obtaining money and property by means of false and fraudulent pretenses, representations, and promises, in violation of 18 U.S.C. § 1341; and

e. To knowingly cause to be transmitted by wire in interstate and foreign commerce, writings, signs, signals, pictures, or sounds for the purpose of executing a scheme and artifice to defraud, and for obtaining money and property by means of false and fraudulent pretenses, representations, and promises, in violation of 18 U.S.C. § 1343.

Manner and Means

3. The defendant carried out the conspiracy in the following manner, and by the following means:

a. FISCHER and Caddick agreed that Caddick would loan FISCHER and QMC $1.2 million of WVHA's funds in exchange for a $10,000 payment from FISCHER and QMC; the payment was to be concealed by making it falsely appear to be payment for consulting services.

b. Caddick showed documents to board members of WVHA which made the loan appear to be legitimate and secured by property and assets, which in fact, the letter of credit issued by FADB and provided by FISCHER, which was to secure the loan, was bogus and worthless, and the accounts receivable of QMC which were also to secure the loan had already been pledged to another entity; none of these facts were disclosed to WVHA's board members.

c. Caddick did not disclose to the WVHA board members the fact that he was accepting a $10,000 payment from FISCHER and QMC.

d. Upon WVHA's demand for repayment of the $1.2 million loan, FISCHER pretended to attempt to cause QMC to repay the loan by obtaining a bogus draft issued by European American Capital Corp. and drawn on FADB in the amount of $1.2 million; this draft was worthless and was never honored.

Overt Acts

4. In furtherance of the conspiracy, and to achieve the objects thereof, and to conceal the monies illegally

derived from his illegal acts and the commission of his illegal acts, the defendant and his co-conspirators, both known and unknown to the Grand Jury, committed and caused to be committed, in the Middle District of Florida and elsewhere, the following overt acts:

a. In early 1993, Kurt Reichenberger ("Reichenberger") visited FISCHER and Charles Kramer at QMC's offices in Orlando, Florida.

b. In or about April or May 1993, FISCHER talked to Reichenberger about obtaining a letter of credit from FADB to secure a loan for QMC.

c. During a conversation with FISCHER in or about May 1993, Caddick offered to loan $1.2 million of WVHA funds to QMC in exchange for $10,000.

d. In or about June 1993, Caddick showed documents pertaining to the $1.2 million loan to managing directors of WVHA.

e. FISCHER and Caddick signed a letter of agreement and performance agreement on June 30, 1993, in which FISCHER pledged QMC's accounts receivable to secure the $1.2 million loan.

f. In or about June 1993, FISCHER obtained a letter of credit from FADB and sent it to NationsBank in Miami, Florida.

g. In or about July 1993, Caddick caused $1.2 million to be transferred from the State of Florida Investment Pool in Tallahassee, Florida to WVHA's account at NationsBank in Deland, Florida, then wired to QMC's account at Barnett Bank in Orlando Florida, after being told by a representative of NationsBank that the letter of

credit from FADB was not signed or in the proper format to be honored.

h. In or about August 1993, Caddick requested that FISCHER pay him $10,000.

i. In or about August 1993, FISCHER prepared a QMC check request/voucher, requesting that a check for $10,000 be issued to Stella Greenfield, Caddick's mother, purportedly as a consulting fee.

j. In or about September 1993, FISCHER mailed the $10,000 check to Stella Greenfield in Midlothian, Illinois.

k. In or about September 1993, Stella Greenfield deposited the $10,000 check into her personal account and, at Caddick's request, wrote and mailed two checks to Caddick in the amounts of $4,700 and $5,000.

l. Following WVHA's demand for repayment of the $1.2 million loan in or about June 1994, FISCHER obtained and sent a document purporting to be a draft in the amount of $1.2 million to QMC.

m. In or about January 1994, Caddick gave FISCHER a phony invoice which indicated that Stella Greenfield provided consulting services to QMC, which FISCHER gave to QMC's accounting department.

n. In or about October 1994, Caddick asked Charles Kramer to sign a backdated letter of agreement which showed that Caddick was due payment for marketing a computer program for QMC.

All in violation of Title 18, United States Code, Section 371.

COUNTS SEVEN THROUGH THIRTEEN

(Money Laundering)

1. Paragraphs 1 through 6 of Count One and Paragraphs 2 through 7 of Count Three are realleged and incorporated as if fully set forth in this paragraph.

2. In or about July 1993, FISCHER fraudulently caused $1.2 million to be wired from WVHA's account at NationsBank in Deland, Florida, to QMC's account at Barnett Bank in Orlando, Florida, account number 2831459824.

3. On or about the dates listed below, in Orange County, Florida, in the Middle District of Florida, and elsewhere,

JEFFREY ALAN FISCHER

the defendant herein, did knowingly engage and attempt to engage, and instruct other individuals to engage and attempt to engage, in monetary transactions in property derived from specified unlawful activity, that is, fraud involving an organization receiving federal funds, in violation of 18 U.S.C. § 666(a)(1)(A), as follows:

Count	Date	Amount	Account	Check/Wire
Seven	7/2/93	$75,000.00	From Barnett Bank Account #2831459824 Orlando, Florida to Frankford Bank Account #216-729-7	Wire Transfer on July 2, 1993 payable to Tarpal Music drawn on QMC account
Eight	7/8/93	$21,154.26	From Barnett Bank Account #2831459824 Orlando, FL to First National Bank of Central Florida Account #0-00-201428-9	Check #36215 payable to CKJF, Inc. and drawn on QMC account
Nine	7/8/93	$303,065.00	From Barnett Bank Account #2831459824 Orlando, FL to Barnett Securities Account #000-203017	Transfer on July 8, 1993 to Barnett Securities and drawn on QMC account
Ten	7/9/93	$60,000.00	From Barnett Bank Account #2831459824 Orlando, FL to Citibank Arizona Account #101 710 1419	Wire Transfer on July 9, 1993 payable to Bill and Stephanie Norvell
Eleven	7/13/93	$48,000.00	From Barnett Bank Account #2831459824 Orlando, FL to Bank of China Account #012-875-9209690-3	Wire Transfer on July 13, 1993 payable to FADB Resources (HK) Ltd. and drawn on QMC account
Twelve	7/14/93	$27,750.22	From Barnett Bank Account #2831459824 Orlando, FL to Bank of Central Florida Account #0-00-201428-9	Check #36240 payable to CKJF, Inc. and drawn on QMC account
Thirteen	7/25/93	$325,000.00	From Barnett Bank Account #2831459824 Orlando, FL to Olde Discount Corp. Account #229-00381	Check #36298 payable to Olde Discount Corp.

All in violation of Title 18, United States Code, Section 1957.

FORFEITURES

1. The allegations contained in Counts Seven through Thirteen of this indictment are hereby realleged and incorporated by reference for the purpose of alleging forfeitures pursuant to the provisions of Title 18, United States Code, Section 982.

2. The defendant, JEFFREY ALLAN FISCHER, shall forfeit to the United States of America, pursuant to Title 18, United States Code, Section 982(a)(2), any and all right, title, and interest he may have in any property, real and personal, involved in violations of Title 18, United States Code, Section 1957, alleged in Counts Seven through Thirteen of this indictment, and any property traceable to such property.

3. If any of the property described above, as a result of any act or omission of the defendant:

a. cannot be located upon the exercise of due diligence;

b. has been transferred or sold to, or deposited with, a third party;

c. has been placed beyond the jurisdiction of the court;

d. has been substantially diminished in value; or

e. has been commingled with other property which cannot be divided without difficulty,

the United States of America shall be entitled to forfeiture of substitute property under the provisions of Title 21, United States Code, Section 853(p), as incorporated by Title 18, United States Code, Section 982(b)(1)(B).

A TRUE BILL,

/s/ Illegible
Foreman

CHARLES R. WILSON
United States Attorney

By /s/ Cynthia Hawkins Collazo
Cynthia Hawkins Collazo
Assistant United States Attorney

By /s/ Rick L. Jancha
Rick L. Jancha
Managing Assistant U.S. Attorney

No. _____

UNITED STATES DISTRICT COURT

MIDDLE *District of* FLORIDA

ORLANDO *Division*

THE UNITED STATES OF AMERICA

vs.

JEFFERY ALLAN FISCHER

INDICTMENT

Violations: 18 U.S.C. § 666(a)(1)(A)
18 U.S.C. § 666(a)(2)
18 U.S.C. § 1341
18 U.S.C. § 1343
18 U.S.C. § 371
18 U.S.C. § 1957

A true bill.

Illegible
Foreman.

Filed in open court this 12th ***day***

of June, ***A.D. 1996***

/s/ Sally A. Coffey
Clerk.

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

UNITED STATES OF AMERICA, PLAINTIFF, VS. JEFFREY ALLAN FISCHER, DEFENDANT.	CASE NO: 95-239-CR-ORL-22 ORLANDO, FLORIDA JULY 17, 1996

TRIAL PROCEEDINGS

BEFORE THE HONORABLE ANNE C. CONWAY
UNITED STATES DISTRICT JUDGE, AND A JURY

* * *

[Testimony of Robert Bowman]

[p. 574] HIS OPINION IS IRRELEVANT.

THE COURT: OVERRULED.

A. I HAD A, A VERY STRONG OPINION ABOUT THAT MATTER. IT WAS MY UNDERSTANDING THAT IT WAS INAPPROPRIATE AND ACTUALLY ILLEGAL FOR TAX FUNDS, WHICH SINCE WE HAD A CO-MINGLED GENERAL FUND, ANY FUNDS THAT THE HOSPITAL HAD WERE, WERE THUS CONSIDERED TAX FUNDS, FOR THOSE FUNDS TO BE USED TO FINANCE ANY PRIVATE ENTERPRISE.

Q. DID YOU COMMUNICATE YOUR OPINION TO MR. CADDICK?

A. YES, I DID.

Q. DURING 1993, DID WEST VOLUSIA HOSPITAL AUTHORITY COLLECT ANY MONEY FROM THE FEDERAL GOVERNMENT?

A. YES. THEY COLLECTED SIGNIFICANT FUNDS. MOST HEALTH CARE ORGANIZATIONS COLLECT A MAJORITY OF THEIR FUNDS FROM PROGRAMS THAT ARE FUNDED BY THE FEDERAL GOVERNMENT.

Q. AND WHEN YOU SAY A LOT OF MONEY, COULD YOU GIVE US A GENERAL ROUGH IDEA, DURING 1993, HOW MUCH MONEY WAS COLLECTED FROM THE FEDERAL GOVERNMENT, LET'S SAY IN MEDICARE ALONE?

A. BETWEEN 10 AND 15 MILLION DOLLARS.

Q. NOW, APART FROM THE LEGALITY OF THE LOAN, DID YOU EXPRESS ANY OPINION AS TO THE ADVISABILITY OF IN TERMS OF RISK OF MAKING SUCH A LOAN?

MR. HORWITZ: EXCUSE ME, YOUR HONOR. I'M GOING

* * *

[p. 620] A. NO, SIR, YOU DID NOT.

Q. DID YOU HAVE AN OPPORTUNITY TO READ THE PRICE WATERHOUSE AUDIT?

A. YES, I DID.

Q. AND ISN'T IT TRUE THAT PRICE WATERHOUSE COMMENTED ON THE LOAN, BUT DID NOT COMMENT THAT IT WAS ILLEGAL?

A. THAT IS CORRECT.

Q. AND IS IT YOUR TESTIMONY THAT IF PRICE WATERHOUSE THOUGHT THAT IT WAS ILLEGAL, THEY WOULDN'T HAVE SAID SOMETHING?

A. NO, THAT WAS NOT MY TESTIMONY.

Q. DID YOU ALSO HAVE AN OPPORTUNITY TO SEE A MEMORANDA FROM MR. CADDICK TO MR. POWERS, ASKING POWERS TO REVIEW THE LOAN DOCUMENTS IN RELATION TO THE 1.2 MILLION DOLLAR LOAN?

A. NO, I HAVE NOT SEEN THAT DOCUMENT.

Q. AND IN THE NORMAL COURSE OF YOUR JOB RESPONSIBILITIES, THERE WOULD BE NO REASON FOR YOU TO SEE THAT, WOULD THERE?

A. THAT'S CORRECT.

Q. IN RELATION TO THE COLLECTION OF FUNDS THAT THE WEST VOLUSIA HOSPITAL AUTHORITY COLLECTS FROM THE GOVERNMENT, YOU SAID IT WAS IN THE NEIGHBORHOOD OF 10 TO 15 MILLION DOLLARS IN THE YEAR 1993.

A. CORRECT.

[p. 621] Q. IS THAT IN RELATION TO THE HOSPITAL AUTHORITY PROVIDING SERVICES TO ITS PATIENTS?

A. THROUGH THE, THE MEDICARE PROGRAM, AND THROUGH OTHER GOVERNMENTALLY SPONSORED PROGRAMS; CORRECT.

Q. OTHER GOVERNMENTALLY SPONSORED PROGRAMS LIKE MEDICARE/MEDICAID, CHAMPUS?

A. VA.

Q. VA?

A. CORRECT.

Q. IN OTHER WORDS, THE HOSPITAL AUTHORITY, AS ANY HOSPITAL, WOULD GET PAID FOR PROVIDING A SERVICE, AND ONE OF THOSE PAYORS WAS THE GOVERNMENT?

A. THAT'S CORRECT.

Q. AND IS THAT THE MONEY THAT YOU WERE REFERRING TO?

A. YES, IT WAS.

Q. IN RELATION TO THIS MONEY THAT WAS RECEIVED, THAT WENT INTO SOME OF THE, THE WORK THAT YOU WOULD DO IN OPTIMIZING, THAT PROGRAM YOU SAID ABOUT OPTIMIZING, YOU'RE TALKING ABOUT, LIKE, WE DON'T WANT TO INCREASE, IT DOES NO GOOD TO INCREASE A PRICE OVER HERE BECAUSE IT'S A FIXED PAYMENT FROM MEDICARE ANYWAY, SO LET'S INCREASE IT SOMEPLACE ELSE?

A. THE PAYMENT DOESN'T, BUT THE CHARGE STRUCTURE DOES; CORRECT.

Q. I'M SORRY. YOU LOST ME WITH THAT ONE.

[p. 622] A. YOU SAID, DID THE PAYMENT RELATE TO THE RATE CHARGING? AND I WOULD

SAY, I WOULD SAY, NO, THAT IT'S NOT IN RELATIONSHIP TO THE PAYMENT. IT'S MORE IN RELATIONSHIP TO THE STRUCTURE OF THE RATE WHAT WAS CHARGED.

Q. SO YOU, DID I UNDERSTAND YOUR TESTIMONY CORRECTLY, YOU COULD RAISE THE FEE ON A SERVICE PROVIDED TO A MEDICARE PATIENT, YOU COULD CHARGE MORE, BUT YOU WERE ONLY GOING TO GET PAID WHAT MEDICARE WANTED TO PAY YOU?

A. A FIXED AMOUNT, CORRECT.

Q. AND THAT'S THE KIND OF PAYMENTS THAT WERE RECEIVED FROM THESE VARIOUS DIFFERENT PROGRAMS FOR THE HOSPITAL.

A. THAT WAS THE TYPE OF PAYMENTS RECEIVED FROM, FROM, FROM MEDICARE, A FIXED PAYMENT FOR SERVICES RENDERED.

Q. IN RELATION TO THE HOSPITAL AUTHORITY'S DEALINGS WITH A LETTER OF CREDIT, WERE YOU AWARE OF WHETHER THERE WAS A LETTER OF CREDIT ISSUED BY THE HOSPITAL AUTHORITY PRIOR TO THE 1.2 MILLION DOLLAR LOAN?

A. NO, I WAS NOT AWARE OF THAT.

Q. WERE YOU AWARE OF WHETHER THERE WAS ONE ACCEPTED?

A. I WAS NOT AWARE OF ONE.

Q. WAS THERE ANY, DID YOU HAVE ANY KNOWLEDGE OF SOME KIND OF ACTIVITY IN RELATION TO THE FLORIDA HOSPITAL, A JOINT VENTURE?

A. I WAS RESPONSIBLE FOR RUNNING A, A MODEL WHICH

* * *

[Testimony of Mark VanFleet]

* * *

[p. 629] Q. AND DO YOU KNOW WHETHER OR NOT IT WAS TAKEN TO MR. VANFLEET?

A. AFTER THE FACT, YES. AT THE TIME, NO, I DO NOT.

MS. COLLAZO: THAT'S ALL I HAVE, YOUR HONOR.

MR. HORWITZ: NOTHING FURTHER, YOUR HONOR.

THE COURT: ALL RIGHT. YOU MAY BE EXCUSED.

MS. COLLAZO: THE GOVERNMENT CALLS MARK VANFLEET.

(WITNESS SWORN BY THE DEPUTY CLERK)

MARK VANFLEET

WHO WAS FIRST DULY SWORN, WAS EXAMINED AND TESTIFIED AS FOLLOWS:

DIRECT EXAMINATION

BY MS. COLLAZO:

Q. MORNING. WOULD YOU PLEASE TELL US WHAT YOUR NAME IS AND SPELL YOUR LAST NAME.

A. MY NAME IS MARK VANFLEET. LAST NAME V-A-N, F-L-E-E-T.

Q. WHAT DO YOU DO FOR A LIVING?

A. I'M A – SELF-EMPLOYED AS A CONSULTANT.

Q. AND AT ANY TIME WERE YOU INVOLVED WITH THE WEST VOLUSIA HOSPITAL AUTHORITY?

A. YES. I WAS INVOLVED WITH MANAGEMENT THERE FOR SEVERAL YEARS.

Q. WHAT IS YOUR EDUCATIONAL BACKGROUND?

[p. 630] A. UNDERGRADUATE DEGREE IN PSYCHOLOGY AND SOCIOLOGY AND MASTER'S DEGREE IN HOSPITAL ADMINISTRATION.

Q. TELL US WHEN IT WAS THAT YOU FIRST BECAME ASSOCIATED WITH WEST VOLUSIA HOSPITAL AUTHORITY.

A. IN 1988.

Q. AND HOW, IN WHAT CAPACITY?

A. I WAS HIRED TO COME TO DELAND TO BE RESPONSIBLE FOR THE DAY-TO-DAY OPERATION OF THE FISH HOSPITAL AND WORK UNDER THE DIRECTION OF THE THEN CHIEF EXECUTIVE OFFICER WHO WAS RESPONSIBLE FOR RUNNING BOTH HOSPITALS.

Q. BOTH WEST VOLUSIA MEMORIAL AND LITTLE FISH?

A. YES.

Q. AND HOW LONG WERE YOU IN THAT POSITION?

A. UM, ABOUT SIX MONTHS.

Q. AND THEN WHAT HAPPENED?

A. THE BOARD TERMINATED THE ADMINISTRATOR WHO HAD HIRED ME AND PUT ME IN A POSITION OF ACTING ADMINISTRATOR FOR A FEW MONTHS AND THEN MADE ME RESPONSIBLE FOR THE OPERATIONS AND EVENTUALLY GAVE ME THE TITLE OF CHIEF EXECUTIVE OFFICER.

Q. AND WHAT WERE YOUR DUTIES?

A. MY GENERAL RESPONSIBILITIES WERE FOR THE OVERALL OPERATION OF THE AUTHORITY THAT INCLUDED THE HOSPITAL AND SOME OF THEIR OTHER OPERATIONS.

Q. AND WHAT WOULD YOU DO WHEN YOU SAY THE OVERALL [p. 631] RESPONSIBILITY? COULD YOU JUST GIVE US A LITTLE MORE DETAIL?

A. WHEN I BECAME CHIEF EXECUTIVE, I REALLY REPORTED TO THE AUTHORITY AND WAS RESPONSIBLE FOR THE – CARRY OUT THE ACTS OF THE, OF THE AUTHORITY AS IT CAME TO MANAGEMENT, WHETHER IT WAS MEDICAL STAFF, FINANCE OR OPERATIONS.

Q. YOU'RE DESCRIBING THE AUTHORITY. CAN YOU TELL US WHAT THAT IS?

A. THE WEST VOLUSIA HOSPITAL AUTHORITY IS A FIVE-MEMBER BODY ELECTED TO FOUR-YEAR TERMS, OUT OF THE GEOGRAPHIC AREA OF WESTERN VOLUSIA COUNTY. THE AUTHORITY HAS EXISTED 30-SOME YEARS. IT'S, THE BOARD IS DIRECTLY ELECTED BY THE PUBLIC. IT'S ONE OF THE FEW HOSPITAL AUTHORITIES IN THE STATE THAT HAS AN ELECTED BOARD.

Q. AND IS THERE A SPECIAL TAX DISTRICT?

A. YES. WEST VOLUSIA HOSPITAL AUTHORITY IS AN INDEPENDENT TAXING SPECIAL DISTRICT THAT WAS CREATED FOR THE PURPOSE OF OPERATING THE HOSPITAL.

Q. DO YOU KNOW ROBERT CADDICK?

A. YES.

Q. HOW DID YOU FIRST COME TO MEET HIM?

A. BOB CAME TO THE AUTHORITY. HE WAS HIRED BY THE THEN TWO FINANCE PEOPLE AT THE HOSPITAL. AND CAME IN TO WORK AS THE INTERNAL AUDITOR FOR THE HOSPITAL AUTHORITY.

* * *

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

UNITED STATES OF AMERICA,	
PLAINTIFF,	**CASE NO: 95-239-CR-ORL-22**
VS.	**ORLANDO, FLORIDA JULY 18, 1996**
JEFFREY ALLAN FISCHER,	
DEFENDANT.	

TRIAL PROCEEDINGS

BEFORE THE HONORABLE ANNE C. CONWAY
UNITED STATES DISTRICT JUDGE, AND A JURY

[Testimony of Michael Stephan Grable, MD]

* * *

[p. 862] A. NO, THAT'S CORRECT.

Q. JUST THAT SMALL PORTION?

A. THAT'S RIGHT.

Q. AND MR. VANFLEET WAS THERE.

A. YES.

Q. NOW, THOSE THREE INDIVIDUALS WERE FULL-TIME EMPLOYEES. THEY WERE THERE ALL THE TIME.

A. YES.

Q. WORKING HOURS?

A. CORRECT.

Q. IN ADDITION TO THOSE INDIVIDUALS WHO WERE IN-HOUSE, THERE WAS ALSO THE, THE ACCOUNTING FIRM OF PRICE WATERHOUSE ON, RETAINED TO DO AN AUDIT; IS THAT TRUE?

A. THAT'S CORRECT.

Q. YOU SAY THAT THE FIRST TIME YOU SAW MR. POWERS' OPINION WAS AT OR ABOUT THE TIME THE OPINION IS DATED?

A. YES.

Q. AND WHAT'S THE DATE?

A. IT'S MARCH 22ND, '94.

Q. IN ADDITION TO THE OPINION IN WRITING, ISN'T IT ALSO TRUE THAT MR. POWERS WOULD HAVE DISCUSSED HIS OPINION WITH THE BOARD?

A. YES.

Q. AND THOSE DISCUSSIONS TOOK PLACE SOMETIMES AT BOARD MEETINGS.

[p. 863] A. THAT'S CORRECT.

Q. WHEN I SAY BOARD MEETINGS, COMMISSION MEETINGS?

A. RIGHT.

Q. ISN'T IT TRUE THAT MR. POWERS' OPINION, AS STATED IN WRITING AND ORALLY TO THE BOARD, WAS THAT THE LOAN WAS NOT ILLEGAL UNDER THE LAWS OF THE STATE OF FLORIDA?

A. THAT'S TRUE.

Q. IT WAS ALSO HIS OPINION THAT IT WASN'T A GOOD BUSINESS DECISION.

A. THAT'S CORRECT.

Q. THAT WAS EVERYBODY'S OPINION, WASN'T IT?

A. THAT'S CORRECT.

Q. AND ISN'T IT ALSO TRUE THAT PRICE WATERHOUSE, WHEN THEY DID THEIR AUDIT AND PREPARED THE WRITTEN AUDIT, MENTIONED THIS LOAN.

A. YES.

Q. AND IN MENTIONING THE LOAN, HOWEVER, THEY, ACCOUNTANTS, DID NOT SAY IT WAS ILLEGAL, DID THEY?

A. THEY DID NOT.

Q. YOU HAD AN OPPORTUNITY TO MEET WITH MR. JOHN, AND I MAY NOT BE PRONOUNCING THIS RIGHT, MCGULKY (PH) OF PRICE WATERHOUSE?

A. YES.

Q. MR. MCGULKY WAS ONE OF THE AUDITORS WHO, ONE OF THE ACCOUNTANTS WHO WORKED ON THE AUDIT.

[p. 864] A. THAT'S RIGHT.

Q. YOU MET WITH HIM, AND ONE OF THE THINGS THAT WAS DISCUSSED WAS THIS LOAN; ISN'T THAT CORRECT?

A. YEAH. AT THE TIME OF WHEN THEY PRESENTED THE AUDIT TO THE INDIVIDUAL BOARD MEMBERS.

Q. YES. NOT DURING THE TIME THE LOAN WAS MADE, BUT AFTER PRICE WATERHOUSE HAD CONDUCTED ITS AUDIT.

A. THAT'S RIGHT.

Q. AND ISN'T IT TRUE THAT IN THE DISCUSSION WITH MR. MCGULKY CONCERNING THE LOAN, HE DID NOT SAY THAT THE LOAN WAS ILLEGAL?

A. THAT'S CORRECT.

Q. THE REASON THAT MR. CADDICK WAS GIVEN THIS CHANGE IN AUTHORITY ON INVESTMENTS WAS TO IMPROVE THE RETURN ON THE INVESTMENTS; ISN'T THAT TRUE?

A. THAT'S TRUE.

Q. AND THAT WAS TO BENEFIT THE HOSPITAL AUTHORITY, WASN'T IT?

A. YES.

Q. AND ISN'T IT TRUE THAT CADDICK HAD STATED THAT HE THOUGHT THE LOAN WAS, WAS LEGAL AND REASONABLE?

A. I DON'T REMEMBER THOSE SPECIFIC STATEMENTS, BUT THAT WAS THE IMPRESSION I GOT.

Q. THE IMPRESSION?

A. RIGHT.

* * *

[Excerpt Of Argument For Judgement Of Acquittal
By Mark L. Horwitz, Counsel For Jeffrey Fischer]

* * *

[p. 884] AS FAR AS THE CONSPIRACY COUNT, THE SAME PROBLEM APPLIES. THEY SAY THAT THERE IS A CONSPIRACY TO VIOLATE THESE SAME STATUTES AND YET THERE IS NO PROOF THAT THE AGREEMENT OCCURRED PRIOR TO THE LOAN BEING GIVEN.

THE WIRE FRAUD, OBVIOUSLY, RESTS ON THE SAME FACTS. AS FAR AS THE MONEY LAUNDERING IS CONCERNED, THE REQUIREMENTS FOR MONEY LAUNDERING UNDER 1957 IS THAT THERE IS A TRANSFER OF FUNDS IN A BANK OVER $10,000, AND THAT THAT TRANSFER WAS DONE KNOWINGLY OF, OF PROCEEDS DERIVED FROM A CRIMINAL ACTIVITY. I SUBMIT TO YOU THAT THE KNOWING REQUIREMENT IS THAT MR. FISCHER HAD TO KNOW THAT WHEN THE 1.2 MILLION DOLLAR LOAN CAME, THAT THAT LOAN AND THE PROCEEDS OF THAT LOAN WAS ILLEGAL. AND THAT EVIDENCE ON THAT IS NONEXISTENT.

THE EVIDENCE ON THAT IS KRAMER WENT OUT TO ASIA FIRST, AFTER A LONG RELATIONSHIP WITH MR. REICHENBERGER, AND IT APPEARED TO BE A GOOD BANK TO HIM. HE NEVER SAID ANYTHING TO THE CONTRARY TO MR. FISCHER. SO THERE IS A LACK OF ANY EVIDENCE TO PROVE THAT IN 1993, WHEN THESE LOAN PROCEEDS WERE TRANSFERRED, THAT MR. FISCHER HAD ANY KNOWLEDGE THAT THE BANK WAS NO GOOD, THAT THE LOAN

WOULD NOT BE REPAID, THAT THEY INTENDED TO DEFRAUD THE BANK, OR THAT MR. CADDICK WAS BRIBED TO GET THE LOAN.

FINALLY, AND I'M GOING TO THROW THIS OUT TO [p. 885] YOUR HONOR, AND IT'S IT'S NOT REAL CLEAR. THE 666 HAS AN EXCEPTION. AND THAT EXCEPTION IS CONTAINED IN SUBPART C, I BELIEVE IT IS. THAT SAYS THAT THE STATUTE DOES NOT APPLY TO ROUTINE PAYMENTS. THE THING THAT MAKES THIS UNCLEAR IS IN THIS SETTING, THE HOSPITAL AUTHORITY, EVEN THOUGH IT IS A GOVERNMENTAL AGENCY, IS, IN FACT, FUNCTIONING AS A PROVIDER OF HOSPITAL SERVICES. AND IT PROVIDES HOSPITAL SERVICES. AND WHETHER IT MAKES MONEY OR LOSES MONEY IS NOT AN ISSUE.

THE FEES THAT IT GETS FROM MEDICAR/ MEDICAID, CHAMPUS, AS TESTIFIED IN THIS TRIAL, THEY ARE SET FEES. WHETHER THE HOSPITAL MAKES MONEY OR LOSES MONEY, IT GETS ITS SET FEES. AND I WOULD SUBMIT THAT IT'S VERY SIMILAR TO ANY OTHER BUSINESS TRANSACTION.

NOW, THE CASES ON THIS DON'T COME RIGHT OUT AND SUPPORT MY POSITION. THERE'S DICTA THAT WOULD BE AGAINST MY POSITION. I'M GOING TO TELL YOU THAT. BUT I BELIEVE THAT THIS KIND OF ACTIVITY, EVEN THOUGH IT IS A GOVERNMENT AGENCY, IS NOT THE KIND OF GRANT OR LOAN OR PAYMENT THAT IS COVERED. THIS COULD JUST AS WELL BE FLORIDA HOSPITAL OR, OR ORMC, OR ANY OTHER, OR ANY PRIVATE HOSPITAL OR ANY PRIVATE BUSINESS THAT THE GOVERNMENT SAYS, I'M

GOING TO PAY YOU TO PROVIDE A SERVICE, WHETHER YOU MAKE MONEY OR LOSE MONEY, WHETHER SOMEBODY STEALS EVERY CENT YOU HAVE. LIKE THE MAN SAYS, [p. 886] IF THE GUY GOES IN WITH PNEUMONIA, THEY'RE GOING TO GET THE SAME DOLLAR FIGURE NO MATTER WHAT.

SO I THINK, TECHNICALLY, THAT THEIR EXCEPTION TO THIS STATUTE IN THIS PARTICULAR CASE MAY APPLY, WHICH WOULD REMOVE 666 FROM ITS APPLICATION IN THIS CASE. BUT I WANT TO TELL THE COURT CANDIDLY I DON'T HAVE ANY CASES RIGHT ON POINT TO SUPPORT THAT POSITION.

FOR THE REASONS STATED, YOUR HONOR, I WOULD ASK THAT THE COURT ENTER A JUDGMENT OF ACQUITTAL AS TO EACH AND EVERY COUNT. AND I'LL GIVE THE COURT THESE CASES. YOUR HONOR, I'M SORRY, I DON'T HAVE ANOTHER COPY OF BROWN. THAT'S 79 F. 3RD 1550. AND I ONLY HAVE ONE COPY OF BONITA.

MR. FUSSELL: I'VE GOT ONE.

MR. HORWITZ: YOUR HONOR, IF I SAID 202, I MEANT TO SAY 18 US CODE 201. THAT'S THE BRIBERY STATUTE.

THE COURT: MS. COLLAZO?

MS. COLLAZO: YES, YOUR HONOR. YOUR HONOR, WHAT WE, IN FACT, HEARD IS CLOSING ARGUMENT BUT NOT A LEGAL JUSTIFICATION TO DISMISS THIS CASE. WHAT WE'RE HEARING IS AN ARGUMENT FOR A JURY TO SAY, WELL, THE GOVERNMENT HASN'T PROVED FRAUD. THERE'S A LOT,

AMPLE, OVERWHELMING EVIDENCE OF FRAUD IN THIS CASE.

THE CHARGE IN COUNT ONE SAYS THAT THE DEFENDANT OBTAINED BY FRAUD 1.2 MILLION DOLLARS. THE GOVERNMENT

* * *

DEC 15 1999

(3)

No. 99-116

Supreme Court U.S.
FILED
DEC 15 1999
CLERK

In The

Supreme Court of the United States

JEFFREY ALLAN FISCHER,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

BRIEF FOR PETITIONER

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December 15, 1999

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QUESTION PRESENTED

Whether Medicare payments to a hospital for services provided to Medicare patients qualify as "benefits" to meet the jurisdictional requirements of Title 18 U.S.C. § 666 so as to federalize crimes of theft, embezzlement, and bribery involving the hospital.

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OPINION BELOW

The opinion of the United States Court of Appeals for the Eleventh Circuit is reported at 168 F.3d 1273 (11th Cir. 1999), and is reproduced in the Appendix accompanying the Petition for Writ of Certiorari in this case at 1.[1]

JURISDICTION

The Eleventh Circuit entered judgment on March 4, 1999. On April 28, 1999, the Eleventh Circuit denied Mr. Fischer's motion for rehearing and suggestion for rehearing *en banc*. On July 15, 1999, Mr. Fischer filed his Petition for a Writ of Certiorari. The Court granted the Petition on November 1, 1999. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

The central statutory provision involved in this case is 18 U.S.C. § 666, which criminalizes theft or bribery concerning programs receiving federal funds. The statute provides as

[1] Throughout this brief, Pet. App. refers to the Appendix to the Petition for Writ of Certiorari. J. App. refers to the Joint Appendix filed with this Court. R. refers to the Record on Appeal filed with the Court of Appeals for the Eleventh Circuit.

follows:

(a) Whoever, if the circumstance described in subsection (b) of this section exists—

(1) being an agent of an organization, or of a State, local, or Indian tribal government, or any agency thereof—

(A) embezzles, steals, obtains by fraud, or otherwise without authority knowingly converts to the use of any person other than the rightful owner or intentionally misapplies, property that—

(i) is valued at $5,000 or more, and

(ii) is owned by, or is under the care, custody, or control of such organization, government, or agency; or

(B) corruptly solicits or demands for the benefit of any person, or accepts or agrees to accept, anything of value from any person, intending to be influenced or rewarded in connection with any business, transaction, or series of transactions of such organization, government, or agency involving anything of value of $5,000 or more; or

(2) corruptly gives, offers, or agrees to give anything of value to any person, with intent to influence or reward an agent of an organization or of a State, local or Indian tribal

government, or any agency thereof, in connection with any business, transaction, or series of transactions of such organization, government, or agency involving anything of value of $5,000 or more;

shall be fined under this title, imprisoned not more than 10 years, or both.

(b) The circumstance referred to in subsection (a) of this section is that the organization, government, or agency receives, in any one year period, benefits in excess of $10,000 under a Federal program involving a grant, contract, subsidy, loan, guarantee, insurance, or other form of Federal assistance.

(c) This section does not apply to bona fide salary, wages, fees, or other compensation paid, or expenses paid or reimbursed, in the usual course of business.

(d) As used in this section—

(1) the term "agent" means a person authorized to act on behalf of another person or a government and, in the case of an organization or government, includes a servant or employee, and a partner, director, officer, manager, and representative;

(2) the term "government agency" means a subdivision of the executive, legislative, judicial, or other branch of government, including a department, independent

establishment, commission, administration, authority, board, and bureau, and a corporation or other legal entity established, and subject to control, by a government or governments for the execution of a governmental or intergovernmental program;

(3) the term "local" means of or pertaining to a political subdivision within a State;

(4) the term "State" includes a State of the United States, the District of Columbia, and any commonwealth, territory, or possession of the United States; and

(5) the term "in any one-year period" means a continuous period that commences no earlier than twelve months before the commission of the offense or that ends no later than twelve months after the commission of the offense. Such period may include time both before and after the commission of the offense.

18 U.S.C. § 666 (Supp. 1999).

STATEMENT OF THE CASE

A. The Charges Against Petitioner

On December 7, 1995, a federal grand jury in the United States District Court for the Middle District of Florida returned a six-count indictment against Petitioner. (J. App. 1; R. 1-1). All the charges therein stemmed from a $1.2 million loan made by the West Volusia Hospital Authority ("WVHA") to Quality Medical Consultants, Inc. ("QMC"). (R. 1-1).

Specifically, Counts One and Two alleged that Petitioner, as QMC's President, had procured the loan by fraud and a bribe of $10,000 to Robert Caddick, WVHA's Chief Financial Officer, in violation of 18 U.S.C. § 666. (R. 1-1). Counts Three through Six alleged mail fraud, wire fraud, and conspiracy. (R. 1-1).

On June 12, 1996, the grand jury returned a superseding indictment, which set forth the first six counts and added seven counts of money laundering in violation of 18 U.S.C. § 1957. (J. App. 1, 6-23). The unlawful activity specified in the money laundering counts was a violation of 18 U.S.C. § 666. (J. App. 19-21).

Petitioner pleaded not guilty to each count, and the case proceeded to trial. (J. App. 1).

B. The Trial

Petitioner's trial before the district court and a jury commenced on July 15, 1996. (J. App. 1). The evidence introduced during the trial established the following.

Petitioner was the President and part owner of QMC, a private company that performed various auditing services for hospitals. (R. 5-54, 6-207, 6-484).

WVHA was an independent taxing district created for the purpose of administering hospitals in Volusia County, Florida. (J. App. 32). Caddick was the Chief Financial Officer of WVHA. (R. 8-860). Historically, WVHA had the authority to invest its excess funds. (See R. 8-861). In early 1993, however, WVHA modified its investment policy to improve the return on investments. (J. App. 36). Specifically, WVHA decided that it would move away from investing its cash reserves in bank accounts and would move toward investing those reserves in solid investment accounts at higher yields over longer periods. (R. 7-636-7-737).

In the summer of 1993, WVHA loaned $1.2 million to QMC. (R. 6-398). This loan resulted primarily from negotiations between Fischer and Caddick. (R. 6-380, 6-383). WVHA believed that the loan to QMC was proper under its current investment policy. (R. 7-652). Furthermore, WVHA's attorney advised that the loan was legal under Florida law. (J. App. 34). After QMC received the $1.2 million loan from

WVHA, QMC paid $10,000 to Caddick's mother. (R. 5-172).

The government maintained at trial that the loan had been secured by fraud because Fischer had pledged an invalid letter of credit. Additionally, the government contended that Fischer had fraudulently pledged QMC's accounts receivable to secure the loan when those accounts were already pledged to another creditor. Finally, the government argued that the loan was secured by a $10,000 bribe from Fischer to Caddick.

Petitioner maintained at trial that he believed the letter of credit was valid. Additionally, Petitioner contended that although QMC had previously pledged its accounts receivable to another creditor, that pledge was not inconsistent with its obligations to WVHA. Finally, Petitioner asserted that the $10,000 payment to Caddick was an after-the-fact gratuity and not an illegal bribe and that the payment was submitted to Caddick's mother simply at Caddick's request.

The only evidence introduced at trial to establish the statutory prerequisite for a fraud and bribery conviction under 18 U.S.C. § 666 -- *i.e.*, that the affected entity, WVHA, had received, in any one year, benefits in excess of $10,000 under a federal program -- was the very brief testimony of Robert Bowman, WVHA's finance director. Specifically, Mr. Bowman testified:

> Q. During 1993, did West Volusia Hospital Authority collect any money from the federal

government?

A. Yes. They collected significant funds. Most health care organizations collect a majority of their funds from programs that are funded by the federal government.

Q. And when you say a lot of money, could you give us a general rough idea, during 1993, how much money was collected from the federal government, let's say in Medicare alone?

A. Between 10 and 15 million dollars.

(J. App. 25).

Cross-examination of Mr. Bowman revealed that the $10-15 million in federal funds was paid to WVHA for providing services to patients receiving benefits under the federal Medicare program. (J. App. 26-28). There was no evidence introduced that WVHA administered any programs or federal funds for the federal government. For example, there was no testimony that WVHA received monies from the federal government in the same way a Medicare intermediary or carrier receives monies and then made reimbursement decisions regarding those monies. The testimony was simply that WVHA received payments for services. (J. App. 26-28).

The jury convicted Petitioner on all counts. (J. App. 2). On October 25, 1996, the district court sentenced Petitioner, pursuant to the federal sentencing guidelines, to sixty-five months' imprisonment, three years' supervised release, and 100 hours' community service. (J. App. 2). In addition, Petitioner was required to participate in a mental health treatment program and to pay $1,200,000 in restitution. (J. App. 2). Petitioner timely filed an appeal. (J. App. 3). Petitioner began serving his prison sentence on January 8, 1997. (See J. App. 3).

While his appeal was pending, Petitioner filed two motions for a new trial based on newly discovered evidence and numerous *Brady* violations committed by the government which came to light only after the conclusion of the trial. (J. App. 3-4; R. 1-124, 1-139).[2] The district court denied both of these

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[2] During Petitioner's trial, Caddick refused to cooperate with Fischer's counsel and did not testify per Fischer's subpoena because the case against Caddick was still pending. (R. 1-139, Ex. A, at 4). After pleading guilty and being sentenced, Caddick provided affidavits to Petitioner which revealed for the first time that he had been cooperating with the government since November of 1994, over a year before Fischer's indictment. (R. 1-129, Caddick Aff. ¶ 7).

The government's decision not to call Caddick as a witness is explained in Caddick's affidavit, when he revealed that the prosecutor had stated: "Unless you give me something useful, your testimony in all likelihood will acquit Mr. Fischer." (R. 1-139, Ex. A, at 3). Caddick also disclosed in the affidavits that the $10,000 payment was not a bribe, as he had agreed to make the $1.2 million loan prior to requesting and receiving the payment. (R. 1-129, Caddick Aff. ¶ 5; R. 1-139, Ex. A, at 1-2). In addition, Caddick set forth that he had not mentioned his mother's name to Fischer until August of 1993, which was well after the loan had been made. (R. 1-129, Caddick Aff. ¶ 2; R. 1-139, Ex. A, at 6).

The prosecution did not reveal this information even though it was inconsistent with the prosecutor's theory of the case. The prosecution

motions without an evidentiary hearing. (J. App. 3-4; R. 1-130, 1-142). Petitioner filed appeals from both of those denials. (J. App. 3-4; R. 1-132, 1-143).

The Court of Appeals for the Eleventh Circuit consolidated Petitioners' appeals from his convictions and from the denials of his motions for a new trial. (J. App. 4-5).

C. The Eleventh Circuit's Decision

The Eleventh Circuit affirmed Petitioner's convictions under 18 U.S.C. § 666. (Pet. App. 1). The Court found that "based entirely on the plain language of § 666(b)" the statutory prerequisite for Petitioner's convictions was satisfied. (Pet. App. 11). Specifically, the Court held -- without elaboration -- that "[b]ecause WVHA received payments under a federal assistance program, WVHA received a type of 'benefits' expressly covered by § 666(b)." (Pet. App. 11).

The Court stated further that the legislative history of § 666(b) also supported its conclusion. (Pet. App. 11). According to the Court, its holding fulfilled the policy aspirations of the statute's drafters, stating that the

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strenuously argued that Fischer knew the payment was a bribe because Caddick had directed the payment to his mother prior to the loan. (R. 8-951). The prosecution also failed to disclose that Caddick had been given and passed three polygraph examinations by the government. (R. 1-129, Caddick Aff. ¶ 7; 1-139, Ex. A, at 3). The information withheld was critical to Fischer's defense that the payment was an after-the-fact gratuity solicited by Caddick and not a *quid pro quo* for the loan.

"determination that WVHA is an agency receiving 'benefits' within the meaning of § 666(b) serves the statute's purpose of protecting from fraud, theft, and undue influence by bribery the money distributed to health care providers, and WVHA in particular, through the federal Medicare program and other similar federal assistance program." (Pet. App. 11-12).

SUMMARY OF ARGUMENT

Medicare payments to a hospital for services provided to Medicare patients do not qualify as "benefits" and, therefore, cannot satisfy the statutory prerequisite for conviction under 18 U.S.C. § 666 for four reasons.

First, the plain language of 18 U.S.C. § 666(b) provides that the entity affected by defendant's theft or bribery must have received benefits under a federal program. Under the federal Medicare program, it is the patient who receives the benefits, while the hospital simply receives payments for services provided. Moreover, the plain language of 18 U.S.C. § 666(c) specifically exempts Medicare payments from the statute's coverage, as they are expenses reimbursed in the usual course of business. Accordingly, the plain language of 18 U.S.C. § 666 clearly contemplates a distinction between benefits and payments.

Second, the legislative history and purpose of 18 U.S.C. § 666 confirm that the statute is intended to address

theft and bribery in connection with entities that actually receive and administer benefits under a federal program and not simply entities that receive payments or expenses reimbursed in the usual course of business.

Third, the Court's precedents in analogous contexts support the conclusion that a hospital's receipt of Medicare payments does not constitute the receipt of benefits under a federal program within the meaning of 18 U.S.C. § 666.

Fourth, a finding by this Court that the receipt of payments for services provided under a federal program equates to the receipt of benefits under that program would lead to virtually limitless federal liability and thereby violate the fundamental principles of our federal system of government.

ARGUMENT

Federal crimes "are solely creatures of statute." *Liparota* v. *United States*, 471 U.S. 419, 424 (1985). Therefore, "when assessing the reach of a federal criminal statute, [courts] must pay close heed to language, legislative history, and purpose in order strictly to determine the scope of the conduct the enactment forbids. Due respect for the prerogatives of Congress in defining federal crimes prompts restraint in this area." *Dowling* v. *United States*, 473 U.S. 207, 213 (1985). It is, after all, "the legislature, not the Court, which is to define a crime, and ordain its punishment." *United States*

v. *Wiltberger*, 18 U.S. (5 Wheat.) 76, 95 (1820).

In the matter before this Court, the plain language, legislative history, and purpose of 18 U.S.C. § 666 unequivocally mandate that Medicare payments to a hospital for services provided to Medicare patients cannot satisfy the statutory prerequisite for conviction. Furthermore, a contrary conclusion would violate this Court's precedents as well as the fundamental precepts of federalism.

I. THE PLAIN LANGUAGE OF 18 U.S.C. § 666 DEMONSTRATES THAT MEDICARE PAYMENTS TO A HOSPITAL FOR SERVICES PROVIDED TO MEDICARE PATIENTS CANNOT SATISFY THE STATUTORY PREREQUISITE FOR CONVICTION.

The criminal statute at issue here, 18 U.S.C. § 666, requires -- as a statutory prerequisite for conviction -- that the organization, government, or agency affected by the defendant's theft or bribery receive "in any one year period, benefits in excess of $10,000 under a Federal program involving a grant, contract, subsidy, loan, guarantee, insurance, or other form of Federal assistance." 18 U.S.C. § 666(b). The statute provides further that it "does not apply to bona fide salary, wages, fees, or other compensation paid, or expenses paid or reimbursed, in the usual course of business." 18 U.S.C. § 666(c).

The starting point in every case involving the construction of a statute is, of course, the language of the statute itself. *Ernst & Ernst* v. *Hochfelder*, 425 U.S. 185, 197

(1976). "Courts in applying criminal laws generally must follow the plain and unambiguous meaning of the statutory language." *Salinas* v. *United States*, 118 S. Ct. 469, 474 (1997) (quoting *United States* v. *Albertini*, 472 U.S. 675, 680 (1985)).

The Eleventh Circuit's tortured construction of § 666 is contrary to the plain language of the statute.

A. Medicare Payments to a Hospital for Services Provided to Medicare Patients Do Not Qualify as Benefits under 18 U.S.C. § 666(b).

An individual cannot be convicted under 18 U.S.C. § 666 unless the government has proven that the affected entity *received benefits under a federal program*. 18 U.S.C. § 666(b). In the instant case, the Eleventh Circuit held that WVHA's receipt of payments from Medicare for services provided to patients constituted receipt of benefits within the meaning of the statute and, therefore, satisfied the statutory prerequisite for Fisher's convictions. (Pet. App. 11 ("Because WVHA received *payments* under a federal assistance program, WVHA received a type of '*benefits*' expressly covered by § 666(b).") (emphasis added)). The language of the statute, however, is completely bereft of any support for this conclusion. No where does the language provide that a payment -- without more -- is a type of benefit. The language expressly states that the entity must receive benefits under a federal program, not merely payments.

A brief examination of the federal Medicare program

illustrates that it is the patient who receives the benefits under that federal program and not the health care provider. The hospital or other health care provider simply receives payments from Medicare for services provided to patients. The party that receives the benefits of that federal program is -- and remains at all times -- the individual patient.

Medicare is the federal health insurance program specifically established for individuals who are either disabled or 65 years of age or older. 42 U.S.C. § 1395 *et seq*. The Health Care Financing Administration ("HCFA"), which is a division of the United States Department of Health and Human Services, administers the Medicare Program. To that end, HCFA contracts with local insurance companies, which are called intermediaries under Part A and carriers under Part B, to process claims for reimbursement. 42 U.S.C. §§ 1395h, 1395u.

Medicare essentially consists of two parts: Hospital Insurance, which is known as Part A, and Supplementary Medical Insurance, which is known as Part B. See 42 U.S.C. § 1395 *et seq*. Part A provides insurance benefits for inpatient hospital services, skilled nursing facility services, home health care, and hospice care. 42 U.S.C. §§ 1395c-1395i-4. Part B provides insurance benefits for the cost of physician services, outpatient hospital services, medical equipment and supplies, and other health services and supplies. 42 U.S.C. §§ 1395j-1395w-4. Under Part A, the health care provider receives payments directly from Medicare. 42 U.S.C. § 1395f. Under

Part B, the health care provider receives payments either directly from Medicare or from the individual patient. 42 U.S.C. § 1395n.[3]

The language of the Medicare statute itself is absolutely clear that the patient is the recipient of the benefits, not the service provider. The statute prefaces that "[a]ny *individual entitled to insurance benefits* under this subchapter may obtain *health services* from any institution, agency, or person qualified to participate under this subchapter if such institution, agency, or person undertakes to *provide* him such *services*." 42 U.S.C. § 1395a (emphasis added). Part A specifically states: "The *benefits provided to an individual* by the insurance program under this part shall consist of entitlement to have *payment* made on his behalf." 42 U.S.C. § 1395d(a) (emphasis added). Part B specifically states: "The *benefits provided to an individual* by the insurance program established by this part shall consist of entitlement to have *payment* made to him or on his behalf." 42 U.S.C. § 1395k(a)(1) (emphasis added). Part B provides further that Medicare's use of private insurance carriers is intended "to provide for the administration of the benefits under this part with maximum efficiency and convenience for *individuals entitled to benefits* under this part

[3] In this case, the government failed to establish at trial whether the Medicare payments WVHA received were for services provided under Part A or Part B. The distinction between the two programs, however, ultimately is immaterial to the issue before the Court and, therefore, should have no bearing on the Court's analysis.

and for *providers of services . . . to such individuals*." 42 U.S.C. § 1395u(a) (emphasis added). A hospital is defined specifically under the statute as a "*provider of services*" and not a recipient of benefits. 42 U.S.C. § 1395x(u) (emphasis added). Under both Part A and Part B, therefore, it is the individual patient who receives the benefits, while the qualified health care provider simply provides services and receives payments for those services on a cost basis.

Accordingly, when the plain meaning of the term "benefits" is viewed in the relevant context of the federal Medicare program, it is beyond peradventure that WVHA did not receive the "benefits" necessary to satisfy the statutory prerequisite for Petitioner's convictions. To countenance the Eleventh Circuit's holding in this case -- *i.e.*, that the receipt of any payment for goods or services provided under a federal program equates to the receipt of a benefit under that program -- would lead to absurd results and a virtually limitless reach of Congress' authority under the Spending Power.

For example, under the Eleventh Circuit's rationale, a grocery store owner who receives payments from the federal government for groceries it provides to food stamp recipients would be considered to have received benefits under the federal food stamp program. Certainly, it is the customer who has received benefits under that federal program; the store owner has simply been compensated for the goods it provided. See *United States* v. *LaHue*, 998 F. Supp. 1182, 1192 (D. Kan.

1998) (finding that "there is no jurisdiction under section 666 when the target recipient of the pertinent federal benefit has received the funds Congress intended him or her to receive"), *aff'd*, 170 F.3d 1026 (10th Cir. 1999).

Similarly, under the Eleventh Circuit's reasoning, a university that accepts federal student loan checks as payment for the classes, housing, and meals it provides to students would be deemed to have received benefits under the federal student loan program. Undeniably, it is the student who is the beneficiary of that program, and the university is simply compensated for the goods and services it provided. See *United States* v. *Wyncoop*, 11 F.3d 119, 122 (9th Cir. 1993) (holding that the college never received federal funds under the loan program).

Many entities -- like WVHA -- receive payments from the federal government for goods or services that they provide under circumstances that may well be traceable ultimately to a federal program. The conclusion of the Eleventh Circuit that those payments are benefits, within the meaning of 18 U.S.C. § 666(b), should be rejected by this Court.

B. Medicare Payments to a Hospital for Services Provided to Medicare Patients Are Specifically Exempted from the Statute's Coverage by 18 U.S.C. § 666(c).

The statute also specifically exempts from coverage *expenses reimbursed in the usual course of business*. 18 U.S.C. § 666(c). Petitioner submits that the Medicare payments WVHA received from the government are precisely the type of expenses exempted under the plain language of 18 U.S.C. § 666(c).

As discussed previously, health care providers -- like WVHA -- provide services to Medicare beneficiaries and are then paid for those services by the government. This is a classic reimbursement scenario, occurring daily in the usual course of business. In fact, this Court has repeatedly held that health care providers are reimbursed for services rendered to Medicare beneficiaries. For example, in the case of *Your Home Visiting Nurse Services, Inc.* v. *Shalala*, 119 S. Ct. 930, 932 (1999), the Court acknowledged that "[u]nder the Medicare Act . . . , the Secretary of Health and Human Services reimburses the providers of covered health services to Medicare beneficiaries." Similarly, in *Shalala* v. *Guernsey Memorial Hospital*, 514 U.S. 87, 91 (1995), the Court recognized that "[u]nder the Medicare reimbursement scheme . . . , participating hospitals furnish services to program beneficiaries and are reimbursed by the Secretary through fiscal intermediaries." Additionally, in *Good Samaritan Hospital* v. *Shalala*, 508 U.S. 402, 404 (1993), the Court stated that "[u]nder the [Medicare] program, providers

of health care services can enter into agreements with the Secretary of Health and Human Services pursuant to which they are reimbursed for certain costs associated with the treatment of Medicare beneficiaries." Finally, in *Bowen* v. *Georgetown University Hospital*, 488 U.S. 204, 205 (1988), the Court acknowledged that "[u]nder the Medicare program, health care providers are reimbursed by the Government for expenses incurred in providing medical services to Medicare beneficiaries."

WVHA's receipt of Medicare payments from the government constituted a purely commercial reimbursement transaction, identical in all respect to transactions between WVHA and other private insurance payors. As such, these payments are reimbursed in the usual course of business and, therefore, outside the reach of 18 U.S.C. § 666. See *United States* v. *Copeland*, 143 F.3d 1439, 1441-42 (11th Cir. 1998) (recognizing that organizations engaged in purely commercial transactions with the federal government are not subject to § 666).

To adopt the Eleventh Circuit's holding that there is simply no distinction between a benefit and a payment under the statute would render, in effect, the language of subsection c superfluous. This Court should reject such a result. *Hohn* v. *United States*, 118 S. Ct. 1969, 1976 (1998) ("We are reluctant to adopt a construction making another statutory provision superfluous."); *Freytag* v. *Commissioner*, 501 U.S. 868, 877

(1991) ("Our cases consistently have expressed 'a deep reluctance to interpret a statutory provision so as to render superfluous other provisions in the same enactment.'") (quoting *Pennsylvania Dep't of Public Welfare* v. *Davenport*, 495 U.S. 552, 562 (1990)). Subsections b and c -- when read in conjunction -- clearly contemplate a distinction between benefits and payments.

II. THE LEGISLATIVE HISTORY AND PURPOSE OF 18 U.S.C. § 666 CONFIRM THAT MEDICARE PAYMENTS TO A HOSPITAL FOR SERVICES PROVIDED TO MEDICARE PATIENTS CANNOT SATISFY THE STATUTORY PREREQUISITE FOR CONVICTION.

The legislative history and purpose of 18 U.S.C. § 666 confirm that the statutory language "receives benefits under a federal program" means the *actual receipt and administration of benefits* under a federal program and not the receipt of payments or the receipt of expenses reimbursed in the usual course of business.

Congress enacted § 666 as part of the Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473, 98 Stat. 1976 (1984). In enacting § 666, Congress intended "to augment the ability of the United States to vindicate significant acts of theft, fraud, and bribery involving Federal monies that are disbursed to private organizations or State and local governments pursuant to a Federal program." S. Rep. No. 98-225, at 369 (1984), *reprinted in* 1984 U.S.C.C.A.N. 3182, 3510.

Specifically, Congress stated that it was the statute's "intent to reach thefts and bribery in situations of the types involved in the *Del Toro*, *Hinton*, and *Mosley* cases." *Id.* at 370.

In the three cases cited by Congress, the government had provided a non-federal entity with federal funding for its operational expenses, including salaries, and then charged that entity with administering federal funds under a specific federal program. The briberies at issue were committed in relation to the administration of those funds. *United States* v. *Del Toro*, 513 F.2d 656 (2d Cir. 1975) (bribery of a city agency that the government funded and then charged with administering federal monies under the HUD program); *United States* v. *Mosley*, 659 F.2d 812 (7th Cir. 1981) (bribery of a state program funded entirely by the government and charged with administering federal monies under the CETA program); *United States* v. *Hinton*, 683 F.2d 195 (7th Cir. 1982) (bribery of a community-based non-profit corporation that was funded by and charged with administering federal monies under the HUD program), *aff'd*, 465 U.S. 482 (1984).

These cases confirm that Congress' intent in enacting § 666 was to address malfeasance in connection with the actual receipt and administration of federal funds under a federal program. See *United States* v. *Zyskind*, 118 F.3d 113, 116 (2d Cir. 1997) (holding that the intent of § 666 was "to prevent diversions of federal funds not only by agents of organizations that are direct beneficiaries of federal benefits funds, but by

agents of organizations to whom such funds are 'disbursed' for further 'distribut[ion]' to or for the benefit of the individual beneficiaries"). Based on this intent, there could, of course, be instances where an entity receives benefits under the federal Medicare program. For example, the federal government does provide intermediaries and carriers with funding for their operational expenses and then entrusts them with the administration of federal funds under the Medicare program. See 42 U.S.C. § 1395h. Fraud or bribery involving such an entity would violate 18 U.S.C. § 666, as it is precisely the type of conduct that jeopardizes the integrity of the vast sums of money distributed through the Medicare program.

Here, however, Petitioner was convicted of fraud and bribery of WVHA, an entity that does not receive any funding from the federal government for its operational expenses and that was not responsible for administering federal funds under any federal program, including Medicare. The Eleventh Circuit's conclusion that federal money is "distributed" to WVHA through the federal Medicare program improperly characterizes the relationship between WVHA and the federal government. (Pet. App. 11-12 ("In this case, our determination that WVHA is an agency receiving 'benefits' within the meaning of § 666(b) serves the statute's purpose of protecting from fraud, theft, and undue influence by bribery the money *distributed* to health care providers, and WVHA in particular, through the federal Medicare program and other similar federal assistance programs." (emphasis added)). No federal monies

were ever distributed to WVHA. WVHA simply received payments for services it provided to Medicare beneficiaries. Such payments do not satisfy the jurisdictional prerequisite of 18 U.S.C. § 666, and, therefore, Petitioner's convictions should be reversed.

III. THE COURT'S PRECEDENTS SUPPORT THE CONCLUSION THAT MEDICARE PAYMENTS TO A HOSPITAL FOR SERVICES PROVIDED TO MEDICARE PATIENTS CANNOT SATISFY THE STATUTORY PREREQUISITE FOR CONVICTION.

The Court has not yet determined what constitutes the receipt of benefits under a federal program within the meaning of 18 U.S.C. § 666. *Salinas* v. *United States*, 118 S. Ct. 469, 472 (1997) ("We denied certiorari on the question whether the monies paid to the county were 'benefits' under a 'Federal program' under § 666(b), and we assume for purposes of this opinion that the payments fit those definitions."). The Court, however, recently considered an analogous question in the civil context -- specifically, when does an entity qualify as a recipient of federal financial assistance under Title IX. *National Collegiate Athletic Ass'n* v. *Smith*, 119 S. Ct. 924 (1999). Petitioner submits that the Court's decision in *Smith* supports the conclusion that a hospital's receipt of Medicare payments does not constitute the receipt of benefits under a federal program within the meaning of 18 U.S.C. § 666.

In *Smith*, the Court held that the Association's receipt of dues payments from recipients of federal funds -- *i.e.*,

federally funded member institutions -- did not constitute the receipt of federal financial assistance under Title IX. *Smith*, 119 S. Ct. at 926. The Court found that "[a]t most, the Association's receipt of dues demonstrates that it indirectly benefits from the federal assistance afforded its members." *Id.* at 929.

In reaching this decision, the Court relied on its decisions in *United States Department of Transportation* v. *Paralyzed Veterans of America*, 477 U.S. 597 (1986), and *Grove City College* v. *Bell*, 465 U.S. 555 (1984). According to the Court, the teaching of *Paralyzed Veterans* and *Grove City* was that "[e]ntities that receive federal assistance, whether directly or through an intermediary, are recipients within the meaning of Title IX; entities that only benefit economically from federal assistance are not." *Smith*, 119 S. Ct. at 929.

Petitioner submits that the entity that receives federal assistance under the federal Medicare program is the individual patient. The hospital or other health care provider simply receives payments for services provided and thereby profits economically or indirectly from the federal assistance afforded to those patients. As such, the hospital cannot be considered to have received federal assistance within the meaning of 18 U.S.C. § 666.

IV. THE ELEVENTH CIRCUIT'S INTERPRETATION OF 18 U.S.C. § 666 VIOLATES THE FUNDAMENTAL PRECEPTS OF FEDERALISM.

Not only is the Eleventh Circuit's interpretation of 18 U.S.C. § 666 completely contrary to the plain meaning of the statute, its legislative history, and this Court's precedents, it also directly contradicts the fundamental precepts of federalism.

A long recognized constitutional principle, deeply rooted in our criminal justice system, is that the general police power resides in the states, not in the federal government. Therefore, the "States possess primary authority for defining and enforcing the criminal law." *Engle* v. *Isaac*, 456 U.S. 107, 128 (1982). As this Court has acknowledged: "It goes without saying that preventing and dealing with crime is much more the business of the States than it is of the Federal Government." *Patterson* v. *New York*, 432 U.S. 197, 201 (1977).

The Eleventh Circuit's interpretation of § 666 that the receipt of any payment for goods or services provided under a federal program equates to the receipt of a benefit under that program would, in effect, lead to virtually limitless federal liability. To endorse such a broad reading of 18 U.S.C. § 666 would validate the continuous and inappropriate expansion of federal law enforcement into areas traditionally and appropriately belonging to state and local governments. The Court should not sanction such a result.

CONCLUSION

For the foregoing reasons, Mr. Fischer respectfully requests that the opinion of the United States Court of Appeals for the Eleventh Circuit be reversed and that his convictions under 18 U.S.C. § 666 and 18 U.S.C. § 1957, which were premised on § 666, be reversed.

Furthermore, Mr. Fischer may be entitled to reversal of his conviction in Count Six, conspiracy, as that count provided that three of the five possible offenses used to support the conspiracy were violations of 18 U.S.C. § 666. See *Zant* v. *Stephens*, 462 U.S. 862, 881 (1983); *Stromberg* v. *California*, 283 U.S. 359, 367-68 (1931). Additionally, Mr. Fischer's remaining convictions in Counts Three through Five for mail fraud and wire fraud are intertwined with the other allegations of the superseding indictment and may be subject to reversal. Therefore, Mr. Fischer also asks that the case be remanded to the district court to make these determinations.

Respectfully submitted,

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No. 99-116

In the Supreme Court of the United States

JEFFREY ALLAN FISCHER, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTION PRESENTED

Whether a hospital that receives annual payments of between $10 and $15 million under the Medicare program is an "organization, government, or agency [that] receives * * * benefits in excess of $10,000 under a Federal program involving * * * Federal assistance" within the meaning of 18 U.S.C. 666(b).

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In the Supreme Court of the United States

No. 99-116

JEFFREY ALLAN FISCHER, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the court of appeals (Pet. App. A1-A15) is reported at 168 F.3d 1273.

JURISDICTION

The judgment of the court of appeals was entered on March 4, 1999. A petition for rehearing was denied on April 28, 1999. (Pet. App. 16-17). The petition for a writ of certiorari was filed on July 15, 1999, and was granted on November 1, 1999. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTORY PROVISION INVOLVED

Section 666 of Title 18, United States Code, is reproduced in an Appendix to this brief. App., *infra*, 1a-3a.

STATEMENT

Following a jury trial in the United States District Court for the Middle District of Florida, petitioner was convicted on one count of fraud involving an organization receiving federal funds, in violation of 18 U.S.C. 666(a)(1)(A) and 2 (count 1); one count of giving a kickback to an agent of an organization receiving federal funds, in violation of 18 U.S.C. 666(a)(2) and 2 (count 2); one count of mail fraud, in violation of 18 U.S.C. 1341 (count 3); two counts of wire fraud, in violation of 18 U.S.C. 1343 (counts 4-5); one count of conspiracy to commit the above offenses, in violation of 18 U.S.C. 371 (count 6); and seven counts of money laundering, in violation of 18 U.S.C. 1957 (counts 7-13). He was sentenced to 65 months' imprisonment, to be followed by three years of supervised release. He was ordered to pay $1.2 million in restitution. The court of appeals affirmed. Pet. App. A1-A15.

1. Title XVIII of the Social Security Act, 42 U.S.C. 1395-1395ccc (1994 & Supp. III 1997), establishes the federally funded Medicare Program to provide health insurance to the elderly and disabled.[1] A hospital participating under the Medicare program must meet specified conditions of participation and must file a provider agreement with the Secretary of Health and

[1] Part A of the program furnishes insurance that "provides basic protection against the costs of hospital, related post-hospital, home health services, and hospice care." 42 U.S.C. 1395c. Part B of the program is a voluntary insurance program covering physician charges and other medical services. 42 U.S.C. 1395k.

Human Services certifying that the hospital meets the statutory eligibility criteria. 42 U.S.C. 1395bb and 1395cc (1994 & Supp. III 1997); 42 C.F.R. Pts. 488-489. When hospitals provide eligible patients with covered services, the Secretary, through fiscal intermediaries acting as her agents, reimburses the hospital in accordance with the Medicare Act and the Secretary's regulations. 42 U.S.C. 1395f(b)(1), 1395h, 1395x(v)(1)(A) (1994 & Supp. III 1997); *Your Home Visiting Nurse Servs.* v. *Shalala*, 525 U.S. 449, 450-451 (1999).

Reimbursements to a hospital are made by periodic estimated payments and year-end reconciliation. Throughout the hospital's fiscal year, the fiscal intermediary makes advance payments to the hospital that reflect the hospital's estimated costs of anticipated services. 42 U.S.C. 1395g(a); 42 C.F.R. 413.60. At the end of the year, the fiscal intermediary makes whatever retroactive adjustments are appropriate to reconcile the total amount of interim payments paid to the hospital with the amount actually payable to the hospital under the program. 42 U.S.C. 1395x(v)(1)(A)(ii); 42 C.F.R. 413.64(e)-(f); *Good Samaritan Hosp.* v. *Shalala*, 508 U.S. 402 (1993). Each year, Medicare pays more than $100 billion to approximately 6000 hospitals that provide services under the program. Health Care Financing Administration, *1999 Data Compendium* 10, 77 (July 1999).

2. Petitioner was president and a partial owner of QMC, a private company that performed billing audits for health care providers. In 1993, he arranged for QMC to obtain a $1.2 million loan from West Volusia Hospital Authority (WVHA). WVHA is a county agency responsible for operating two hospitals. In 1993, WVHA received between $10 and $15 million in

payments under the Medicare program. Pet. App. 3a; J.A. 25, 26.

As security for the $1.2 million loan from WVHA, petitioner pledged QMC's accounts receivable and a $1 million letter of credit that QMC had obtained through a foreign bank, First Asia Development Bank. QMC's accounts receivable, however, had already been pledged to another QMC creditor, and the terms of the $1 million letter of credit severely limited WVHA's ability to collect on it. Petitioner negotiated the loan with WVHA's chief financial officer, Robert Caddick. Pet. App. 3.

Petitioner used the $1.2 million to repay creditors and to raise the salaries of QMC's five owner-employees, including petitioner. Petitioner also had QMC lend at least $100,000 to a company owned by the First Asia Development Bank representative who had assisted QMC with the $1 million letter of credit. In addition, petitioner used the loan proceeds by causing QMC to open options-trading accounts, which lost about $400,000. Pet. App. 4.

After the loan was made, QMC paid $10,000 to Caddick's mother, Stella Greenfield, by a check marked "consulting fees," even though Greenfield had never performed services for QMC. Greenfield later sent the check proceeds to Caddick. Petitioner noted on the check's invoice that the check was for a "loan origination fee." Pet. App. 5. Caddick later tried to cover up QMC's $10,000 payment to him by proposing to QMC's vice president, Charles Kramer, that he backdate a bogus "contract" for programming services that Caddick had allegedly performed for QMC. *Id.* at 6.

When QMC was unable to repay the loan on its due date, petitioner persuaded First Asia Development Bank to send QMC a $1.2 million draft, which QMC

endorsed and presented to WVHA. First Asia, however, refused to honor the draft when WVHA's bank presented it. Pet. App. 4-5. In December 1994, petitioner was removed from his position as president of QMC. The next month, QMC filed for bankruptcy. *Id.* at 6; Gov't C.A Br. 17.

3. The court of appeals affirmed petitioner's conviction. Pet. App. 1-15. The court of appeals rejected petitioner's contention that the government had failed to prove under 18 U.S.C. 666(b) that the organization affected by the petitioner's prohibited acts (WVHA) "receives, in any one year period, benefits in excess of $10,000 under a Federal program involving a grant, contract, subsidy, loan, guarantee, insurance, or other form of Federal assistance." The court of appeals explained that, under the plain terms of Section 666(b), "the 'benefits' an organization receives under a federal program can be in the form of 'a grant, contract, subsidy, loan, guarantee, insurance, or other form of Federal assistance.'" Pet. App. 11 (quoting 18 U.S.C. 666(b)). The court of appeals further explained that, in 1993, WVHA received between $10 and $15 million under the Medicare program for providing health care services to covered individuals. Pet. App. 11. The court concluded that, "[b]ecause WVHA received payments under a federal assistance program, WVHA received a type of 'benefits' expressly covered by § 666(b)." *Ibid.*

The court of appeals rejected the argument that the funds received by WVHA do not qualify as "benefits" because WVHA is not the "target recipient" of benefits under the Medicare program.[2] Pet. App. 12-15. The

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[2] The court of appeals observed that the record "did not clearly establish whether WVHA received funds directly from the

court explained that the statutory text "focuses on the source of 'benefits,'" requiring that they were received under a federal program involving federal assistance. *Id.* at 14. That language serves to distinguish payments made under an assistance program from payments made in "a purely commercial transaction," but, the court concluded, the statute does not contain any additional requirement that the recipient be a "target recipient." *Id.* at 15.

SUMMARY OF ARGUMENT

A. Section 666 covers acts of bribery involving agents of an "organization, government, or agency [that] receives, in any one year period, benefits in excess of $10,000 under a Federal program involving a * * * a form of federal assistance." The jurisdictional reach of that provision extends to hospitals that receive more than $10,000 annually under the Medicare program. Medicare is a quintessential "federal assistance" program, and the funds it furnishes to hospitals qualify as "benefits." The term "benefits" under Section 666 includes the federal assistance payments made to fulfill the goals of the federal program; it excludes payments made as part of a purely commercial transaction. Hospitals directly receive substantial federal payments under Congress's program to provide assistance to elderly or disabled patients in need of medical care; the payments are not made in a purely commercial context.

The history of Section 666 confirms its applicability to hospitals that receive Medicare payments. The broad language of Section 666 was enacted to ensure

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Medicare program or received funds as an assignee" from a "target recipient," *i.e.*, a Medicare patient, but that Section 666(b) applied to hospitals whether or not the hospital received the payments directly or as an assignee. Pet. App. 14.

federal authority to prosecute acts of bribery involving agents of state and private entities that administered federal assistance programs; Congress intended to overcome limitations in prior law that left federal program funds unprotected in the hands of their recipients. The purpose of Section 666 also supports coverage of hospitals that receive Medicare funds. Section 666 is intended to protect the integrity of vast sums of federal assistance funds by ensuring the integrity of the agents of the organizations that receive them. The proper administration of the Medicare program requires that the hospitals that provide the covered medical care not be undermined by corrupt practices of agents, which could threaten the delivery of services or drive up their costs.

Petitioner erroneously contends (Br. 14-15) that hospitals do not receive "benefits" within the meaning of Section 666 because the beneficiaries of the Medicare program are patients, not hospitals. The focus of Section 666, however, is on the source and character of the payments made, not on whether the recipient is the intended ultimate beneficiary of the federal program. While the beneficiaries of most federal assistance programs are individuals, Section 666 applies when the recipient is an "organization, government, or an agency." Congress intended Section 666 to apply to federal funds paid to agencies and organizations under federal food stamp, disability, welfare, Medicaid, and housing programs even though the payments go to providers of assistance rather than the individuals sought to be assisted.

Petitioner's theory that service providers cannot receive "benefits" is also inconsistent with his concession (Br. 22-23) that Section 666 applies to fiscal intermediaries and other entities that administer or disburse

federal program funds. Like hospitals, those entities may provide services, and they are not the ultimate intended program beneficiaries. His theory of "benefits" is also in tension with the statute's coverage of benefits provided under a "contract" or "loan," which would normally entail a quid pro quo by the recipient. In any event, even if there were a requirement that hospitals themselves be "aided" by federal program funds in order to receive "benefits," there can no doubt that hospitals, which receive substantial guaranteed sources of revenues from the Medicare program, are themselves aided.

B. Petitioner's reliance on subsection (c) of Section 666 is misplaced. That Section states that "[t]his section does not apply to bona fide salary, wages, fees, or other compensation paid, or expenses paid or reimbursed, in the usual course of business." That exemption was intended to apply only to the bribery and solicitation provisions of subsection (a), not to the jurisdictional provision of subsection (b). Medicare payments, in any event, could not be viewed as "expenses paid or reimursed" under subsection (c). The subsection, read as a whole, refers to compensation or expense payments to individuals, not organizations or governments. The origins of subsection (c) in a counterpart exemption from the bank-bribery statute confirm that it was intended to exempt certain payments to individuals, not the federal program payments that were the object of protection under Section 666.

C. The applicability of Section 666 to hospitals that receive Medicare payments is supported by this Court's precedents construing the reach of federal anti-discrimination laws based on the receipt of federal financial assistance. The Court has held that the actual recipients of the federal assistance funds are covered,

while entities that merely benefit incidentally are not. Accordingly, federal anti-discrimination laws have long been understood to apply to hospitals that receive Medicare funds. The parallel inquiry under Section 666 points to coverage of the same hospitals.

D. Finally, the application of Section 666 to hospitals that receive Medicare payments does not threaten principles of federalism or exceed Congress's power under the Spending Clause. Congress has a substantial interest in ensuring that its federal program funds are not dissipated or impaired by acts of fraud or corruption, and Section 666 applies only when an entity voluntarily accepts those funds. This case presents no issue of whether the statute requires any connection between the funds at issue and the criminal act, for petitioner has never raised any such claim. And, more importantly, petitioner's interpretation of the statute to exclude hospitals entirely, despite their receipt of billions of dollars under the Medicare program, would preclude the application of Section 666 even to criminal acts directed at the federal expenditures. That construction would frustrate the purpose of Section 666.

ARGUMENT

A HOSPITAL THAT RECEIVES IN EXCESS OF $10,000 IN MEDICARE PAYMENTS IS WITHIN THE JURISDICTIONAL COVERAGE OF SECTION 666

Section 666(a) makes it an offense, "if the circumstance described in subsection (b) of this section exists," for an agent of an organization, government, or agency to engage in certain acts of theft and fraud involving property valued at $5000 or more (18 U.S.C. 666(a)(1)(A)); for an agent of an organization, government, or agency to corruptly accept anything of value from any person intending to be influenced or rewarded

in connection with any transaction of the organization, government, or agency involving $5000 or more (18 U.S.C. 666(a)(1)(B)); or for any person to offer or give anything of value to any person intending to influence or reward an agent of an organization, government, or agency in connection with a transaction of such organization, government, or agency involving $5000 or more (18 U.S.C. 666(a)(2)). Section 666(b) provides that "[t]he circumstance referred to in subsection (a) of this section is that the organization, government, or agency receives, in any one year period, benefits in excess of $10,000 under a Federal program involving a grant, contract, subsidy, loan, guarantee, insurance, or other form of Federal assistance." 18 U.S.C. 666(b). The text, history, and purpose of the statute all support the conclusion that Section 666 applies to entities that receive federal assistance program payments, including Medicare payments to hospitals, because those payments constitute "benefits" "receive[d] * * * under a Federal program involving * * * Federal assistance."

A. Medicare Payments To Hospitals Are Benefits Under A Federal Assistance Program Within The Meaning Of Section 666(b)

1. *Medicare Payments To Hospitals Are Benefits*

a. There is no dispute in this case that WVHA is an "organization, government, or agency" that "receive[d], in any one year period," more than $10,000 in federal payments. Nor is there any dispute that the payments were received "under a Federal [assistance] program," the Medicare program. The central issue in this case is whether those payments qualify as "benefits" received by WVHA within the meaning of Section 666(b). The language and structure of Section 666 compel the conclusion that the payments made by the Medicare

program to hospitals that furnish services to covered patients are "benefits," as that term is used in Section 666.

The language of Section 666 is "expansive [and] unqualified * * *, both as to bribes forbidden and the entities covered." *Salinas* v. *United States*, 522 U.S. 52, 56 (1997). It broadly provides that Section 666 extends to organizations and agencies that receive "benefits * * * under a Federal program involving a * * * form of Federal assistance." In context, the term "benefits" in that provision includes payments under a federal assistance program. See *United States* v. *Rooney*, 986 F.2d 31, 34 (2d Cir. 1993) (Section 666(b) "expressly equates 'benefits' with 'Federal assistance.'"); see also *Webster's II New Riverside University Dictionary* 166 (1988) (defining "benefit" to include "[p]ayment[] made * * * in accord with a * * * public assistance program"); *The Random House Dictionary of the English Language* 194 (2d ed. 1987) (defining "benefit" to include "a payment * * * given by a * * * public agency"). Congress's intent to protect federal assistance funds in the hands of their recipients is further revealed by the title of Section 666—"Theft or bribery concerning programs receiving Federal *funds*." (emphasis added). See *Almendarez-Torres* v. *United States*, 523 U.S. 224 (1998) (title of statute relevant when discerning meaning of a statute); *INS* v. *National Ctr. for Immigrants' Rights, Inc.*, 502 U.S. 183, 189 (1991) (same).

The focus of Section 666 on the federal-program source of the funds is underscored by its requirement that the "benefits" be received "*under* a Federal program *involving* a grant, contract, subsidy, loan, guarantee, insurance, or other form of *Federal assistance*." 18 U.S.C. 666(b) (emphasis supplied). The statute is

careful to limit its coverage to federal "program[s]" that provide "assistance." Thus, "the use of the term 'benefits' serves to emphasize * * * that the funds must have been received by the organization, government, or agency as part of an 'assistance' program, rather than a purely commercial transaction—the federal government's purchase of goods from a contractor, for example." Pet. App. 14-15.

The Medicare program directly makes payments to participating hospitals for providing covered services to eligible patients. 42 U.S.C. 1395f(a) (Part A); 42 U.S.C. 1395n(a) and 1395*l*(h)(5)(A) (Part B); 42 C.F.R. 424.51 ("Medicare pays the provider for services furnished by a provider.").[3] The federal government does not pay those funds, however, in order to purchase medical services in a commercial transaction. Rather, the government extends those funds under the Medicare program to provide federal assistance to elderly and disabled persons in need of medical care.[4] Because hospitals are

[3] Hospitals may charge patients, however, for deductibles and coinsurance. 42 U.S.C. 1395e (Part A); 42 U.S.C. 1395n(c) (Part B); 42 C.F.R. Pt. 489, subpt. C.

[4] As the Secretary has explained in a related context, hospitals that provide Medicare services do so based on their receipt of federal assistance and not as part of a purely commercial transaction with the government:

> [U]nder Medicare and Medicaid the level of services is determined by providers who are * * *—with Federal assistance—engaging in activities they have long performed. In this respect Medicare and Medicaid payments are indistinguishable from grants to pay the costs of medical services. Indeed, [Medicare] payments often cover medical costs of indigent patients that hospitals would otherwise be required to absorb pursuant to their other legal obligations. In contrast, under a procurement contract the government acts on its own account as a consumer of goods, such as typewriters and paper clips, or services, such as hotel accommodations and rental car services for traveling employees. The level of services under procurement contracts is determined by the government and not, as under Medicaid or Medicare, by the provider.

49 Fed. Reg. 1640 (1984) (concluding that hospitals are covered by Section 504 of the Rehabilitation Act when they provide federally assisted medical services, see pp. 28-30, *supra*).

the actual and direct recipients of Medicare funds, and Medicare is a federal assistance programs, hospitals receive "benefits * * * under a Federal program * * * involving Federal assistance" within the meaning of Section 666(b).

b. The history and purpose of Section 666 also support a broad reading of its jurisdictional scope. The history demonstrates that Congress intended Section 666 to cover entities receiving funds under a federal assistance program. The Senate Judiciary Report accompanying Section 666 stated that the statute "is designed to create new offenses to augment the ability of the United States to vindicate significant acts of theft, fraud, and bribery involving Federal monies that are disbursed to private organizations or State and local governments pursuant to a Federal program." S. Rep. No. 225, 98th Cong., 1st Sess. 369 (1983). The Report observed that 18 U.S.C. 665 makes "theft or embezzlement by an officer or employee of an agency receiving assistance under the Job Training Partnership Act a Federal offense," but "there is no statute of general applicability in this area." S. Rep. No. 225, *supra*, at 369. The Committee further noted that the general theft of federal property statute, 18 U.S.C. 641, was inadequate to protect against theft from entities receiving federal assistance funds. S. Rep. No. 225, *supra*, at 369. The Committee explained that, "[i]n

many cases * * * title has passed to the recipient before the property is stolen, or the funds are so commingled that the Federal character of the funds cannot be shown," giving "rise to a serious gap in the law, since even though title to the monies may have passed, the Federal Government clearly retains a strong interest in assuring the integrity of such program funds." *Ibid.*

With respect to the types of entities protected by the statute, the Senate Report expressed Congress's intent that "the term 'Federal program involving a grant, a contract, a subsidy, a loan, a guarantee, insurance, or another form of Federal assistance' *be construed broadly*, consistent with the purpose of this section to protect the integrity of the vast sums of money distributed through Federal programs." S. Rep. No. 225, *supra*, at 370 (emphasis added). The one limitation that Congress envisioned supports the proposition that the statute covers recipients of federal assistance payments. As Congress explained:

> The concept [of "Federal program"] is not unlimited. The term * * * means that there must exist a specific statutory scheme authorizing the Federal assistance in order to promote or achieve certain policy objectives. Thus, not every Federal contract or disbursement of funds would be covered. For example, if a government agency lawfully purchases more than $10,000 in equipment from a supplier, it is not the intent of this section to make a theft of $5000 or more from the supplier a Federal crime. It is, however, the intent to reach thefts and bribery in situations of the types involved in the *Del Toro*, *Hinton*, and *Mosley* cases.

S. Rep. No. 225, *supra*, at 370. Each of the cases cited by the Committee involved bribery of an official or an agent of an entity that received federal funds under an assistance program. See *United States* v. *Hinton*, 683 F.2d 195, 198-200 (7th Cir. 1982) (bribery involving officials of non-profit entity which administered HUD community development grant funds), aff'd *sub nom. Dixson* v. *United States*, 465 U.S. 482 (1984); *United States* v. *Mosley*, 659 F.2d 812, 815-816 (7th Cir. 1981) (bribery involving official of state agency responsible for administering CETA program); *United States* v. *Del Toro*, 513 F.2d 656, 662-663 (2d Cir.) (bribery involving official of Model Cities Program funded by HUD), cert. denied, 423 U.S. 826 (1975).[5]

The application of Section 666 to hospitals receiving Medicare payments also furthers the statute's purpose "to protect the integrity of the vast sums of money distributed through Federal programs from theft, fraud, and undue influence by bribery." S. Rep. No. 225, *supra*, at 370; see also *United States* v. *Marmolejo*, 89 F.3d 1185, 1193 (1996) (Section 666 "ensure[s] the integrity of federal funds by protecting the integrity of the organizations that receive them."), aff'd *sub nom. Salinas* v. *United States*, 522 U.S. 52 (1997).

That principle is illustrated by this case. Petitioner's conduct in obtaining a loan from WVHA, a Medicare provider, by fraud and giving a kickback to WVHA's chief financial officer threatened the integrity of the

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[5] The Senate Report also explained that Section 666 was intended in part to resolve the disagreement reflected in those cases as to whether 18 U.S.C. 201, which prohibits bribery of a "public official," applied to "a person employed by a private organization receiving Federal monies pursuant to a program." S. Rep. No. 225, *supra*, at 369; see also *Salinas*, 522 U.S. at 58-59.

Medicare program in which WVHA participated. The sound administration of the program relies on officials at participating hospitals who will not be swayed by improper influences that interfere with providing medical care to patients or that drive up the costs of the program. See, *e.g.*, 42 U.S.C. 1395f(a), 1395y(a) (1994 & Supp. III 1997) (Medicare program pays for only reasonable and medically necessary services). Thus, the "determination that WVHA is an agency receiving 'benefits' within the meaning of § 666(b) serves the statute's purpose of protecting from fraud, theft, and undue influence by bribery the money distributed to health care providers, and WVHA in particular, through the federal Medicare program and other similar federal assistance programs." Pet. App. 11-12; see also *Salinas*, 522 U.S. at 61 (acceptance of bribes by official of a jail housing federal prisoners under an agreement with the federal government "was a threat to the integrity and proper operation of the federal program").

2. ***Hospitals Are Not Exempt From Receiving Benefits Because They Are Not The Intended Beneficiaries Of The Medicare Program But Are Reimbursed For Providing Services***

Petitioner and his amicus contend (Br. 14-18; NACDL Amicus Br. 10-14) that WVHA did not receive "benefits" within the meaning of Section 666(b), because the only recipients of benefits under the Medicare Act are the "individual patient[s]" who receive medical services. See, *e.g.*, Pet. Br. 15 ("The party that receives the benefits of that federal program is—and remains at all times—the individual patient."); Pet. Br. 25 ("the entity that receives federal assistance under the federal Medicare program is the individual patient"). Petitioner notes (Br. 16-17) that the Medicare Act itself specifies that individuals are entitled to receive hospital insurance "benefits" in the form of payments to hospitals on the individual's behalf when the hospitals provide covered services. See 42 U.S.C. 1395d(a) (1994 & Supp. III 1997) ("The benefits provided to an individual by the insurance program under this part shall consist of entitlement to have payment made on his behalf."). That definition, however, does not help petitioner, because it explicitly recognizes that the payments made to hospitals providing services under Medicare *are* the "benefits" furnished under the program. See also 42 C.F.R. 400.202 ("*[h]ospital insurance benefits* means payments [to providers] on behalf of * * * an entitled individual for services that are covered").[6]

It also is implausible to suggest that Congress intended to limit the coverage of Section 666 to only those entities that receive federal money as the intended program beneficiaries. A recipient of "benefits" under Section 666 is an "organization, government, or an agency." Those entities frequently are not the intended beneficiary of a federal assistance program but they nonetheless receive federal assistance funds on behalf of the program beneficiaries. For instance, Congress extends food stamp, disability, welfare, Medicaid, and housing assistance to needy individuals

[6] Amicus NACDL acknowledges (Br. 10) that "funds disbursed through the Medicare program are 'benefits'" when received by patients, but argues that they are not when received by the hospital. The statute does not adopt the perspective of the recipient, however, with the result that whether payments are deemed "benefits" depends on who is receiving the federal funds (and why they are being received). Rather, it designates funds as "benefits" when they are received under a "Federal program" involving "Federal assistance."

by providing program funds to agencies and organizations that in turn provide assistance to program beneficiaries.[7] Congress presumably acted with full knowledge of those programs when it drafted Section 666(b) broadly to protect substantial federal assistance payments, whether or not the recipient entity is the beneficiary of the program or provides assistance to the individuals sought to be assisted by the program. See *United States* v. *Zyskind*, 118 F.3d 113, 116 (2d Cir. 1997) ("Nothing in the language of § 666 suggests that its reach is limited to organizations that were the direct beneficiaries of federal funds. The jurisdictional subsection, (b), uses the word 'receives,' rather than the phrase 'is a beneficiary of.'").

Tellingly, not even petitioner argues that the recipients of "benefits" under Section 666(b) are limited to program beneficiaries. Petitioner does not dispute (Br. 22-23) that Section 666 applies to fiscal intermediaries and other entities that administer or disburse funds under a federal program. Such entities, of course, are not the beneficiaries of an assistance program. A hospital providing medical assistance with federal funds intended for that purpose is no different from a fiscal intermediary for purposes of Section 666.

Petitioner similarly argues (Br. 17, 24) that Medicare payments to hospitals are not "benefits" because hospitals are reimbursed for services performed. See also NACDL Amicus Br. 14 (hospitals "do not * * * get aid, they get *paid*"). That misses the point, because the payments at issue are not simply commercial transac-

[7] 7 U.S.C. 2020 (1994 & Supp. IV 1998) (food stamps); 42 U.S.C. 421 (social security disability program); 42 U.S.C. 601 *et seq.* (welfare); 42 U.S.C. 1396 *et seq.* (Medicaid); 42 U.S.C. 1437 *et seq.* (housing); 42 U.S.C. 5301 *et seq.* (community development).

tions, see pp. 12-13, *supra*, but are assistance funds. "The inquiry is not whether there is a *quid pro quo*, but, rather, whether the funds disbursed can be considered Federal assistance within a specific statutory scheme intended to promote public policy objectives and not payments by the government as a commercial entity." *Rooney*, 986 F.2d at 35. The fact that hospitals are paid or reimbursed in exchange for providing Medicare-covered services does not mean that the payments are not made under a federal assistance program.

The statutory language itself provides that benefits can be in the form of "a *grant*, *contract*, *subsidy*, *loan*, *guarantee*, *insurance*, or other form of Federal assistance." 18 U.S.C. 666(b) (emphasis added). "A straightforward reading of this text indicates that § 666(b) encompasses many situations in which the government receives consideration in return for federal assistance." *United States* v. *Copeland*, 143 F.3d 1439, 1441 (11th Cir. 1998). Congress's inclusion of the words "contract" and "loan" are the most obvious indications that Congress contemplated that the government could receive consideration or a quid pro quo in return for extending funds under a federal assistance program. "As a party to a contract, the federal government presumably gets something in return for its consideration, and a loan is not typically a gift or charitable contribution." *United States* v. *Nichols*, 40 F.3d 999, 1000 (9th Cir. 1994) (per curiam); see, *e.g.*, *United States* v. *Marmolejo*, 89 F.3d 1185, 1190-1191 (5th Cir. 1996) (statute applied to agency operating jail housing federal prisoners under contact with federal government), aff'd on other grounds *sub nom. Salinas* v. *United States*, 522 U.S. 52 (1997); *Rooney*, 986 F.2d at 34 (government-sponsored

loan qualified as a benefit even though recipient was required to repay entire loan with interest).[8]

Petitioner further argues (Br. 22-24) that Section 666(b) does not apply to hospitals that receive Medicare payments because hospitals do not administer a federal program like the entities in *Del Toro*, *Hinton*, and *Mosley* or otherwise disburse federal funds to an intended beneficiary. The statute's text, however, imposes no such requirement. The statute applies to any entity that "receives * * * benefits * * * under a Federal [assistance] program"; it draws no distinction between entities that receive federal assistance payments as program beneficiary or administrator and entities that receive federal assistance payments as provider of medical services or other assistance to program beneficiaries.[9]

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[8] Petitioner's construction also conflicts with Congress's intent that Section 666 protect the federal assistance programs at issue in *Hinton*, *Mosley*, and *Del Toro*. See pp. 14-15, *supra*. In each of those instances, "the organization or city agency provided the Federal government with a service by administering a government program." *Rooney*, 986 F.2d at 35; accord *United States* v. *Marmolejo*, 89 F.3d at 1194 n.11. Yet petitioner concedes the coverage of such entities. Pet. Br. 22-23.

[9] Petitioner remarkably asserts (Br. 23-24) that "[n]o federal monies were ever distributed to WVHA" and that WVHA "does not receive any funding from the federal government for its operational expenses." Petitioner elsewhere in his brief (Br. 19-20) acknowledges that Medicare pays hospitals for the costs and expenses of providing covered services. Indeed, Medicare in 1993 paid WVHA $10 to $15 million, a portion of which was based on fixed rates of pay for WVHA's operating costs of providing inpatient hospital care to Medicare patients. J.A. 27-28; see also 42 U.S.C. 1395ww(d) (1994 & Supp. III 1997) (prospective payment system).

In any event, there is no principled reason to distinguish between the services provided by the entities at issue in *Del Toro*, *Hinton*, and *Mosley* and the services provided by hospitals participating under the Medicare program. In both instances, the services are funded by the federal program and provided in furtherance of a federal mission. And the threat to the federal program is the same whether the recipient affected by corrupion administers federal funds or delivers medical serices with federal assistance funds. Corruption affecting both types of recipients threatens their stability and impairs their capacity to provide the level and quality of assistance envisioned by the federal program and thereby adversely affects federal funds furnished by the program.[10]

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[10] Contrary to the suggestion of petitioner's amicus (NACDL Br. 17-18), this case does not present a case of "guesswork reaching out for lenity." *United States* v. *Wells*, 519 U.S. 482, 499 (1997). "The rule of lenity * * * applies only when, after consulting traditional canons of statutory construction, [the Court is] left with an ambiguous statute." *United States* v. *Shabani*, 513 U.S. 10, 17 (1994). Here, both the text and history of Section 666 support the treatment of Medicare payments to hospitals as benefits received under a federal assistance program. By contrast, petitioner construes the statute to protect only federal assistance payments that do not reflect any element of compensation or reimbursement. At the same time, however, petitioner acknowledges that the statute extends to federal funds that are administered by recipients that are not the intended beneficiaries and that are compensated for their services. Because that interpretation has no textual support or logical coherence, the rule of lenity has no application. See *Salinas*, 522 U.S. at 66 (the "rule does not apply * * * when invoked to engraft an illogical requirement to its text").

3. *Hospitals Are Aided By Medicare Funds*

To the extent that Section 666(b) is read (wrongly, we believe) to apply only to those recipients of federal assistance funds that are themselves aided by the funds, hospitals participating under Medicare meet that requirement as well. The Medicare program provides a guaranteed source of revenue to hospitals that provide medical services to individuals who might not otherwise seek or be able to afford medical care. See 49 Fed. Reg. at 1639 ("The Medicare and Medicaid programs were established for the purpose of providing medical services to people who otherwise might not be financially able to obtain them."); see also Medicare Payment Advisory Comm'n, *Report to the Congress: Medicare Payment Policy* 61 (Mar. 1999) (prospective payment rate adjustment under 42 U.S.C. 1395ww(d)(5)(F) for hospitals serving a large number of indigent patients "protect[s] access to care for Medicare and low-income populations *by assisting the hospitals they use*") (emphasis added).

That source of revenue is significant. In 1997 alone, the Medicare program paid more than $100 billion to hospitals. *1999 Data Compendium*, *supra*, at 10. As the American Hospital Association, "the primary organization of hospitals in the United States," recently explained to this Court, "Medicare payments for services rendered to beneficiaries account for approximately forty percent of the revenue of the average member hospital. Hospitals * * * rely on Medicare as a major source of revenue to assure their financial survival." Brief of Amici Curiae The American Hospital Association and the Federation of American Health Systems at 1, *Your Home Visiting Nurse Services, Inc.* v. *Shalala*, 525 U.S. 449 (1999) (No. 97-1489); see also Pet. App. 7

(testimony by WVHA's director of finance that "most health care organizations collect a majority of their funds from programs that are funded by the federal government").[11] Thus, hospitals receive enormous financial advantages from their participation in the Medicare program.

B. Section 666(c) Does Not Exempt Medicare Payments To Hospitals From The Statute's Jurisdictional Coverage

Petitioner also relies on (Br. 19-21) Section 666(c), which provides that "[t]his section does not apply to bona fide salary, wages, fees, or other compensation paid, or expenses paid or reimbursed, in the usual course of business." 18 U.S.C. 666(c). He argues (Br. 21) that, read "in conjunction," subsections (b) and (c) "clearly contemplate a distinction between benefits and payments." Subsection (c), however, does not exempt from the statute Medicare payments that reimburse hospitals for their costs and expenses of providing covered services, and it does not alter the character of such payments as "benefits" within the meaning of subsection (b).

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[11] The American Hospital Association similarly acknowledged, at the inception of the program, that Medicare provides financial assistance to hospitals:

> The enactment of Public Law 89-97 (Social Security Amendments of 1965), commonly called Medicare, will be a great boon to hospitals financially. Both hospitals and the medical profession have given thousands of hours of free care every year since the profession and hospitals took root in this country. Medicare will lift this enormous financial burden from hospitals and enable them to improve their facilities, broaden their services, train their personnel on a continuing basis, and take other steps to continue the improvement of patient care.

Edwin L. Crosby, M.D., Director and Executive Vice President of the Am. Hosp. Ass'n, *The Atlantic Monthly* 106 (July 1966).

1. The role of subsection (c) in Section 666 is to limit the substantive scope of the criminal conduct prohibited by Section 666—bribery under 18 U.S.C. 666(a)(2) and solicitation under 18 U.S.C. 666(a)(1)(B)—clarifying that bona fide salary (or other compensation or expenses reimbursed) cannot be characterized as an improper transaction. Subsection (c) thus "ensure[s] that the statute is not applied to 'acceptable commercial and business practices'"; the subsection has no application "to the nature of the benefit that the agency receives pursuant to the Federal program." *Marmolejo*, 89 F.3d at 1190 n.5 (quoting H.R. Rep. No. 797, 99th Cong., 2d Sess. 30 (1986)).

Petitioner isolates the phrase "expenses paid or reimbursed" in arguing that Medicare payments received by hospitals are exempt from statutory coverage. This Court has repeatedly emphasized, however, that the meaning of statutory language "cannot be determined in isolation, but must be drawn from the context in which it is used." *Deal* v. *United States*, 508 U.S. 129, 132 (1993); see also *Regions Hosp.* v. *Shalala*, 522 U.S. 448, 460 n.5 (1998) ("In expounding a statute, we must not be guided by a single sentence or member of a sentence, but look to the provisions of the whole law, and to its object and policy."). The phrase "expenses paid or reimbursed" in subsection (c) is surrounded by the statutory terms "bona fide" and "in the ususal course of business." Those terms reveal Congress's intention to ensure the statute does not criminalize legitimate, routine business transactions involving individuals. The adjective "bona fide" means "[p]erformed or made in good faith," *Webster's II New Riverside University Dictionary* 188 (1988), and it naturally describes a payment that is not a sham transaction masquerading a kickback. By contrast, "bona fide"

would be a meaningless way to limit the type of qualifying federal financial assistance under Section 666(b), for all such assistance is "bona fide." Similarly, the phrase "usual course of business" would be awkward language for Congress to use to restrict the types of federal assistance programs protected by the statute, for any government extension of funds under such programs is within the usual course of the *government's* business. The phrase "expenses paid or reimbursed," taken in context, thus does not refer to payments made under a federal assistance program within the meaning of Section 666(b).

Other words surrounding the phrase "expenses paid or reimbursed" similarly indicate that Congress intended Section 666(c) to limit the types of payments covered under Section 666(a), not the jurisdictional provision of Section 666(b). The payments described under Section 666(c) are "*salary*, *wages*, fees, and other compensation paid, or expenses paid or reimbursed." 18 U.S.C. 666(c) (emphasis added). The words "salary" and "wages" connote payments to *individuals*, not payments to an "organization, government, or agency" that is the recipient of financial assistance under Section 666(b). Under the well-established principles of *ejusdem generis* and *noscitur a sociis*, the catch-all description of "other compensation paid, or expenses paid or reimbursed" similarly refers to payments to individuals under Section 666(a), not payments to entities under Section 666(b). See *Brogan* v. *United States*, 522 U.S. 398, 403 n.2 (1998) ("Under the principle of *ejusdem generis*, when a general term follows a specific one, the general term should be understood as a reference to subjects akin to the one with specific enumeration."); *Gustafson* v. *Alloyd Co.*, 513 U.S. 561, 575 (1995) ("[A] word is known by the company it keeps

(the doctrine of *noscitur a sociis*). This rule * * * avoid[s] ascribing to one word a meaning so broad that it is inconsistent with its accompanying words, thus giving 'unintended breadth to the Acts of Congress.'") (quoting *Jarecki* v. *G.D. Searle & Co.*, 367 U.S. 303, 307 (1961)). Thus, by providing that "[t]his section shall not apply to bona fide salary, wages, fees, or other compensation paid, or expenses paid or reimbursed, in the usual course of business," Congress meant to ensure that individuals who receive legitimate compensation payments would not be subject to the statute's criminal prohibitions.

2. Petitioner's reliance on Section 666(c) also fails because it violates "the elementary canon of construction that a statute should be interpreted so as not to render one part inoperative." *Department of Revenue of Or.* v. *ACF Indus., Inc.*, 510 U.S. 332, 340 (1994) (internal quotation marks omitted); accord *Kawaauhau* v. *Geiger*, 523 U.S. 57, 61 (1998). To exclude from statutory coverage any federal payment reflecting the economic relationship of "compensation paid, or expenses paid or reimbursed" would render the words "contract" and "loan" in Section 666(b) meaningless, as those forms of federal assistance by their nature include an element of compensation or quid pro quo for the federal funds. See p. 19, *supra*. As the Ninth Circuit has explained, "to extrapolate from [the language of Section 666(c)] a rule that the statute covers only agencies that receive gifts or charitable contributions from the federal government, and excludes all agencies that provide the federal government with some form of quid pro quo" would "not square with the remainder of § 666, which expressly *does* cover organizations receiving 'benefits . . . under a Federal program involving a . . . contract . . . [or] loan'." *Nichols*, 40 F.3d at 1000.

This Court also should reject petitioner's interpretation of Section 666(c) because it would exempt from the statute's protection federal assistance programs in which federal funds are used to compensate the recipient agency or entity for administering a federal program, including those programs involved in *Hinton*, *Mosley*, and *Del Toro*. See *Salinas*, 522 U.S. at 58 (declining to apply Section 666 inconsistently with Congress's intent to reach the situations at issue in *Del Toro*, *Mosley*, and *Hinton*). In each of those decisions, the federal assistance program at issue paid the entity for its costs and expenses. See *Hinton*, 683 F.2d at 198-200 (Community Development Block Grant program paid organization's costs and employees' salaries); *Mosley*, 659 F.2d at 815-816 (CETA program paid agency's costs and employee salaries); *Del Toro*, 513 F.2d at 661-662 (Model Cities Program paid 100% of agency's costs and 80% of its employees' salaries).

3. The history of Section 666(c) confirms Congress's intention to limit the statute's criminal prohibitions, not its jurisdictional scope. When Congress in 1986 added the current version of Section 666(c), Pub. L. No. 99-646, § 59(a), 100 Stat. 3612, the House Report explained that it was amending the statute "to avoid its possible application to acceptable commercial and business practices." H.R. Rep. No. 797, 99th Cong., 2d Sess. 30 (1986). The House Report explained that (*id.* at 30 n.9):

> [Section 666] prohibits bribery of certain public officials, but does not seek to constrain lawful commercial business transactions. Thus, 18 U.S.C. 666 prohibits corruptly giving or receiving anything of value for the purpose of influencing or being influenced in connection with any business, transaction, or series of transactions. The provision

parallels the bank bribery provision (18 U.S.C. 215). *See* Pub. L. No. 99-370, 99 Stat. ___ (1986). *See also* H.R. Rep. No. 335, 99th Cong., 1st Sess. 1985.

Those statements reflect a congressional intent to ensure that good faith or legitimate payments to individuals are not punished as bribery.

The Report's reference to the parallel bank bribery provision also is significant. Congress earlier had amended the bank bribery provision in 18 U.S.C. 215 to include a subsection (c) that contains language identical to that in Section 666(c). Bank Bribery Amendments Act of 1985, Pub. L. No. 99-370, § 2, 100 Stat. 779. The history of Section 215(c) demonstrates that the statutory language was intended to immunize legitimate business payments to employees from criminal punishment. See H.R. Rep. No. 335, 99th Cong., 1st Sess. 1, 7 (1985) (purpose of Section 215(c) was to define "the prohibited conduct" and to exempt from criminal punishment a "bonus paid an employee or the payment or reimbursement of business expenses incurred by the employee" or when "employees of credit unions receive their salaries directly from the company with which the credit union is connected"). The origins of Section 666(c) thus support the conclusion that the provision limits the bribery and solicitation of bribery offenses set forth in Section 666, and not the types of federal programs protected by the statute.

C. The Coverage Of Hospitals Under Section 666 Is Consistent With This Court's Precedents Construing Federal Anti-Discrimination Statutes

Treating hospitals as recipients of benefits under a federal assistance program for purposes of Section 666 accords with decisions of this Court that have construed similarly worded statutes that prohibit discrimination

under programs or activities "receiving Federal financial assistance." 20 U.S.C. 1681(a) (Title IX); 29 U.S.C. 794 (Section 504 of Rehabilitation Act); 42 U.S.C. 2000d (Title VI). This Court has construed that language to require courts "to identify the recipient of federal financial assistance," *i.e.*, the entity that enters into an "agreement to accept the federal funds," and "actually 'receive[s]'" or is "intended to receive the federal money." *United States Dep't of Transp.* v. *Paralyzed Veterans of America*, 477 U.S. 597, 605, 606 (1986); *Grove City College* v. *Bell*, 465 U.S. 555, 564-570 (1984) (schools that participate in student loan programs are recipients of federal funds under Title IX, whether the school directly receives federal funds or students receive the funds earmarked for educational purposes).

Petitioner agrees that determining the scope of the civil rights statutes presents an "analogous question," but he contends (Br. 24-25) that hospitals profit only indirectly from Medicare payments. Petitioner relies (Br. 25) on the principle that the coverage of the anti-discrimination statutes does not follow federal funds "past the recipient to those who merely benefit" from the funds. *Paralyzed Veterans of America*, 477 U.S. at 607; *National Collegiate Athletic Ass'n* v. *Smith*, 525 U.S. 459, 468 (1999) ("[e]ntities that receive federal assistance, whether directly or through an intermediary, are recipients within the meaning of Title IX; entities that only benefit economically from federal assistance are not").

Hospitals receiving Medicare payments, however, are actual recipients of federal payments, not mere indirect beneficiaries from assistance to other parties. Hospitals enter into provider agreements with the Secretary for the very purpose of obtaining federal payments under Medicare, 42 U.S.C. 1395cc, and

hospitals are the direct, actual, and intended recipients of assistance funds under Medicare. As this Court has noted, the "key is to identify the recipient"; if the program "extends money, then the recipient * * * is the entity that receives the money." *Paralyzed Veterans of America*, 477 U.S. at 607 & n.11; see also *id.* at 606 (rejecting argument that "confuses intended *beneficiaries* with intended *recipients*"). It therefore has been the Secretary's long-standing view that hospitals reimbursed under the Medicare program are recipients of "Federal financial assistance" under Title VI and Section 504 of the Rehabilitation Act. 38 Fed. Reg. 17,978-17,984 (1973); 49 Fed. Reg. at 1639; see also *United States* v. *Baylor Univ. Med. Ctr.*, 736 F.2d 1039 (5th Cir. 1984), cert. denied, 469 U.S. 1189 (1985). Accordingly, hospitals participating in the Medicare program must agree to comply with the anti-discrimination statutes applicable to recipients of federal financial assistance. 42 C.F.R. 489.10(b). The well-established treatment of hospitals as recipients of "Federal financial assistance" under anti-discrimination laws thus strongly supports the conclusion that hospitals paid by Medicare are the recipients of "benefits * * * under a Federal [assistance] program."

D. The Application Of Section 666 To Criminal Acts Involving Hospitals That Receive Medicare Payments Is Consistent With Principles Of Federalism

Petitioner finally argues (Br. 26) the application of Section 666 to payments for "services provided under a federal program * * * would, in effect, lead to virtually limitless federal liability" and offend principles of federalism that recognize the States' primary responsibility for enforcing the criminal laws. Petitioner's amicus similarly contends (NACDL Amicus Br. 29) that

Congress lacks power under the Spending Clause, U.S. Const. Art. I, § 8, Cl. 1, to apply Section 666 to prohibit bribery involving "*any* organization that in *any* way receives in a year more than $10,000 from *any source* so long as those funds had at *any* point passed through the bailiwick of a federal program."

This case, however, presents no issue of federalism. Hospitals participating under Medicare receive payments directly under the program. 42 U.S.C. 1395f, 1395g, 1395n. And they receive those payments only as a result of their voluntary choice to participate in the program. 42 U.S.C. 1395cc. Cf. *Paralyzed Veterans of America*, 477 U.S. at 606 ("By limiting coverage to recipients, Congress imposes the obligations of § 504 upon those who are in a position to accept or reject those obligations as a part of the decision whether or not to 'receive' federal funds.").[12] And, "[a]lthough the

[12] Petitioner and his amicus argue (Pet. Br. 17-18; NACDL Amicus Br. 3, 11-12 & n.12) that interpreting the term "benefits" to include payments under federal assistance programs would support extending Section 666 to educational institutions that receive tuition payments funded by federally guaranteed loans and grocery stores that receive food stamps from customers, which petitioner contends (Br. 17) would entail "a virtually limitless reach of Congress's authority under the Spending Power." Assuming that Section 666 would reach those distinct statutory programs, it would not exceed Congress's power. Grocery stores and schools voluntarily choose to participate in a federal assistance program in order to receive federal money. See 7 U.S.C. 2018 (1994 & Supp. IV 1998) (food stamp program); 20 U.S.C. 1094(a) (student loan program). And the government has an interest in ensuring the integrity of program funds extended to those institutions. See, *e.g.*, 7 U.S.C. 2018(a)(1) (Supp. IV 1998) ("business integrity and reputation of the applicant" relevant in determining eligibility to accept and redeem food stamp coupons); 20 U.S.C. 1094(a)(1) and (3) (requiring school to "use funds received * * * and any interest or other earnings thereon solely for the purpose specified in and in

extent of the federal government's assistance programs will bring many organizations and agencies within the statute's scope, the statute limits its reach to entities that receive a substantial amount of federal funds and to agents who have the authority to effect significant transactions." *United States* v. *Westmoreland*, 841 F.2d 572, 577 (5th Cir.), cert. denied, 488 U.S. 820 (1988). In those circumstances, the application of Section 666 to proscribe significant acts of theft, fraud, or bribery involving hospitals receiving Medicare payments does not approach (let alone exceed) the limits of Congress's power. See *Salinas*, 522 U.S. at 61 (application of statute to official who accepted bribes in connection with prisoner held in a jail paid for in significant part by federal funds did not "extend federal power beyond its proper bounds"); see also *Westfall* v. *United States*, 274 U.S. 256, 258-259 (1927) (Holmes, J.) (upholding constitutionality of statute criminalizing misapplication of funds of state banks belonging to Federal Reserve System).

This case does not present the question whether federal funds must be linked to the conduct prohibited by Section 666. In *Salinas*, this Court rejected the contention that Section 666 requires the bribe to affect federal funds, but it reserved the question "whether the statute requires some other kind of connection between a bribe and the expenditure of federal funds." 522 U.S. at 59. Petitioner has never argued in this case that there was not a sufficient connection between his giving a kickback to WVHA's chief financial officer for a loan

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accordance with" student loan program and to "maintain such administrative and fiscal procedures and records as may be necessary to ensure proper and efficient administration of funds received from the Secretary or from students" under program).

and WVHA's receipt of Medicare funds. In any event, under petitioner's construction of the word "benefits," Section 666 would not apply even to those acts of fraud, bribery, or theft by a hospital official that directly affected Medicare funds. See, *e.g.*, *United States* v. *LaHue*, 170 F.3d 1026 (10th Cir. 1999) (Pet. App. 18a-32a) (physicians who received bribes from hospitals in return for referring Medicare patients to hospitals). That construction would defeat the federal government's strong interest in protecting the integrity of entities that receive large amounts of federal assistance payments, while failing to achieve any interest in preserving the proper federal-state balance.[13]

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[13] Petitioner concludes by asserting (Br. 27) that a reversal of his Section 666 convictions would entitle him to a reversal of his count of conviction for conspiracy and to a remand with respect to his mail and wire fraud counts of conviction. Petitioner has waived those contentions, however, by raising them for the first time in his merits brief before this Court. See S. Ct. Rules 14.1(a) and 24.1(a). In any event, those arguments lack merit. Petitioner asserts no basis for reversal of his mail and wire fraud convictions, and the mail and wire fraud offenses were charged as objects of the conspiracy. J.A. 15. In those circumstances, no rational jury could have found that the government failed to establish either of those two valid objects of the conspiracy. See, *e.g.*, *United States* v. *Zvi*, 168 F.3d 49, 55 (2d Cir.), cert. denied, 120 S. Ct. 176 (1999). Thus, as petitioner conceded before the district court in seeking bond pending this Court's review, if petitioner is successful in obtaining a reversal of his Section 666 convictions, "he will still be convicted under Count Three, Mail Fraud, 18 U.S.C. § 1341; Counts Four and Five, Wire Fraud, 18 U.S.C. § 1343; and Count Six, Conspiracy 18 U.S.C. § 371." 11/5/99 Motion and Memorandum 5.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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APPENDIX

Section 666 of Title 18, U.S. Code, provides:

§ 666. Theft or bribery concerning programs receiving Federal funds.

(a) Whoever, if the circumstance described in subsection (b) of this section exists –

(1) being an agent of an organization, or of a State, local, or Indian tribal government, or any agency thereof –

(A) embezzles, steals, obtains by fraud, or otherwise without authority knowingly converts to the use of any person other than the rightful owner or intentionally misapplies, property that –

(i) is valued at $5,000 or more, and

(ii) is owned by, or is under the care, custody, or control of such organization, government, or agency; or

(B) corruptly solicits or demands for the benefit of any person, or accepts or agrees to accept, anything of value from any person, intending to be influenced or rewarded in connection with any business, transaction, or series of transactions of such organization, government, or agency involving any thing of value of $5,000 or more; or

(2) corruptly gives, offers, or agrees to give anything of value to any person, with intent to influence or reward an agent of an organization or

of a State, local or Indian tribal government, or any agency thereof, in connection with any business, transaction, or series of transactions of such organization, government, or agency involving anything of value of $5,000 or more;

shall be fined under this title, imprisoned not more than 10 years, or both.

(b) The circumstance referred to in subsection (a) of this section is that the organization, government, or agency receives, in any one year period, benefits in excess of $10,000 under a Federal program involving a grant, contract, subsidy, loan, guarantee, insurance, or other form of Federal assistance.

(c) This section does not apply to bona fide salary, wages, fees, or other compensation paid, or expenses paid or reimbursed, in the usual course of business.

(d) As used in this section –

(1) the term "agent" means a person authorized to act on behalf of another person or a government and, in the case of an organization or government, includes a servant or employee, and a partner, director, officer, manager, and representative;

(2) the term "government agency" means a subdivision of the executive, legislative, judicial, or other branch of government, including a department, independent establishment, commission, administration, authority, board, and bureau, and a corporation or other legal entity established, and subject to control, by a government or govern-

ment for the execution of a governmental or intergovernmental program;

(3) the term "local" means of or pertaining to a political subdivision within a State;

(4) the term "State" includes a State of the United States, the District of Columbia, and any commonwealth, territory, or possession of the United States; and

(5) the term "in any one-year period" means a continuous period that commences no earlier than twelve months before the commission of the offense or that ends no later than twelve months after the commission of the offense. Such period may include time both before and after the commission of the offense.

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REPLY BRIEF FOR PETITIONER

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February 15, 2000

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Respondent asks this Court to interpret the phrase "receives benefits" under 18 U.S.C. § 666(b) to mean the receipt of any type of economic advantage. This extremely and unjustifiably broad interpretation is contrary to the plain language, structure, and legislative history of the statute. Moreover, Respondent's misinterpretation of 18 U.S.C. § 666 violates the fundamental precepts of federalism and exceeds Congress' authority under the Spending Clause.

I. RESPONDENT'S INTERPRETATION OF 18 U.S.C. § 666 IS CONTRARY TO THE PLAIN LANGUAGE AND STRUCTURE OF THE STATUTE.

Subsection 666(b) is a jurisdictional provision, which is qualified, and significantly narrowed, by subsection 666(c). Subsection (b) expressly limits the statute's coverage to acts of theft or bribery involving an organization that "*receives . . . benefits . . . under a Federal program involving a . . . form of Federal assistance*." 18 U.S.C. § 666(b) (emphasis added). Further, subsection 666(c) expressly exempts from the statute's coverage "bona fide salary, wages, fees, or other *compensation paid, or expenses paid or reimbursed, in the usual course of business*." 18 U.S.C. § 666(c) (emphasis added).

Petitioner submits that hospitals do not receive benefits under the federal Medicare program. They are simply paid or reimbursed in the usual course of business for health care services they have provided to Medicare patients. In fact, a

hospital is a commercial enterprise existing solely for the purpose of -- and compensated in return for -- treating patients.

Respondent cannot credibly contend that Congress designed the Medicare program to provide benefits to hospitals or other health care providers. In fact, Respondent's argument that "hospitals receive enormous financial advantages from their participation in the Medicare program" is specious at best. Gov't Br. 23. Hospitals do not receive any money from the federal government simply because of their participation in the Medicare program. Hospitals receive periodic payments and year-end adjustments -- through an extremely complex cost-reporting mechanism -- only for the actual health care services provided to Medicare beneficiaries.

Respondent's arguments only serve to confuse the issue of what "receives . . . benefits" means under § 666. Certainly, the "recipients" of "benefits" include the patients under the Medicare program who receive health care services. Pet. Br. 14-18. Additionally, as noted in Petitioner's opening brief at 22-23, the "recipients" of "benefits" also include entities that receive federal funds and then further administer those funds for the benefit of program beneficiaries and to accomplish program goals. Accordingly, the term "benefits" under § 666(b) *does* denote the provision of federal funds to entities under a

specified federal program.[1] Respondent, however, would have the Court end its analysis there -- *i.e.*, at the mere receipt of federal funds. Subsection 666(c), however, qualifies subsection (b), such that recipients of federal funds, who are simply being paid for, or reimbursed for, services that they provide under the federal program, are exempted from the reach of the statute. Admittedly, § 666, as a whole, is not a model of precise statutory drafting, but one thing is certain: Respondent cannot read subsection (b) in isolation to mean that every transaction involving an entity which receives federal funds, for whatever purpose, falls under the jurisdictional reach of § 666.

It is a bedrock principle of statutory construction that the provisions of a statute must be interpreted together and that *all* provisions must be given effect. *Lockwood* v. *Exchange Bank*, 190 U.S. 294, 300 (1903); *East Tennessee, Virginia and Georgia Ry. Co.* v. *Interstate Commerce Comm'n*, 181 U.S. 1, 17 (1901). Reading subsection (b) and (c) in tandem and giving them their full effect under the plain language of the statute, it is clear that hospitals do not receive benefits under a federal program. Hospitals -- like all service providers -- are simply paid or reimbursed in the usual course of business. This construction of the statute is supported by the Court's

---

[1] Such a conclusion is supported by the title of the statute: "Theft or bribery concerning programs receiving Federal funds." Additionally, the language in subsection (b) that the affected entity must receive "benefits in excess of $10,000 under a Federal program" also indicates that the statute is designed to protect entities that receive federal funds.

precedents. See, *e.g.*, *Your Home Visiting Nurse Services, Inc.* v. *Shalala*, 119 S. Ct. 930, 932 (1999) ("Under the Medicare Act . . . , the Secretary of Health and Human Services reimburses the providers of covered health services . . . ."); *Shalala* v. *Guernsey Memorial Hosp.*, 514 U.S. 87, 91 (1995) ("Under the Medicare reimbursement scheme . . . , participating hospitals furnish services . . . and are reimbursed by the Secretary through fiscal intermediaries.").

Respondent goes to great lengths in its brief to avoid the limiting effects of § 666(c). Gov't Br. 23-28. Respondent's principle claim is that § 666(c) applies only to the statute's bribery and solicitation provisions found in subsection (a) and not to the jurisdictional provision found in subsection (b). Gov't Br. 8. Respondent's claim is flawed for at least four reasons.

First, Respondent maintains that subsection (c) applies only to subsection (a) to ensure that "the statute does not criminalize legitimate, routine business transactions involving individuals." Gov't Br. 24. Such an argument is unpersuasive. The plain language of subsection (a) -- standing alone -- makes it abundantly clear that the statute does not criminalize legitimate business transactions. For example, subsection (a)(1)(A) provides that one who "*embezzles, steals, obtains by fraud, or otherwise without authority knowingly converts . . . property*" is subject to prosecution. Similarly, subsection (a)(1)(B) provides that one who "*corruptly* solicits or demands

. . . , or accepts or agrees to accept, anything of value" is subject to prosecution. Finally, subsection (a)(2) provides that one who "*corruptly* gives, offers, or agrees to give anything of value to any person, with intent to influence or reward an agent . . . ." is subject to prosecution. The plain language of subsection (a) could not possibly be construed to criminalize legitimate business transactions.

Second, § 666 vividly illustrates Congress' keen awareness of the distinction between the term "subsection" and "section." For example, Congress stated "the circumstance described in *subsection* (b) of this *section* . . . ." 18 U.S.C. § 666(a). Similarly, Congress stated "[t]he circumstance referred to in *subsection* (a) of this *section* . . . ." 18 U.S.C. § 666(b). Congress clearly used the term *subsection* when it was referring to a portion of the statute and the term *section* when it was referring to the entire statute. Subsection (c) states: "This *section* does not apply to bona fide salary, wages, fees, or other compensation paid, or expenses paid or reimbursed, in the usual course of business." 18 U.S.C. § 666(c). Accordingly, Congress unambiguously intended that the entire statute -- *i.e.*, this *section* -- would not apply to expenses reimbursed in the usual course of business.

Third, Respondent's position is illogical as a fundamental matter of statutory construction. If Congress had intended subsection (c) to apply *only* to subsection (a), and not to subsection (b), in all likelihood, Congress would have placed

the contents of subsection (c) either in or after subsection (a) and not after subsection (b).

Fourth, the construction of the statute advanced by Respondent is directly at odds with the Department of Justice's interpretation of the statute. According to the Department of Justice Manual, "18 U.S.C. § 666(c) specifically exempts *benefits* that are bona fide salary, wages, fees, or other compensation paid, or expenses paid or reimbursed in the usual course of business. Federal government money paid to purchase goods in a commercial transaction are not 'benefits' under the statute." 4 Department of Justice Manual 9-1593 (emphasis added). The Department of Justice properly reads subsection (b) in conjunction with subsection (c).

Accordingly, when the plain language of the statute -- taken in its entirety -- is considered, it is beyond dispute that hospitals, as service providers being reimbursed, do not "receive benefits" under a federal program within the meaning of § 666(b).

II. RESPONDENT'S INTERPRETATION OF 18 U.S.C. § 666 IS CONTRARY TO THE LEGISLATIVE HISTORY AND PURPOSE OF THE STATUTE.

Congress' intent in enacting 18 U.S.C. § 666 is remarkably clear. The statute was enacted to address malfeasance in connection with the administration of federal funds under a federal program. George D. Brown, *Stealth Statute -- Corruption, The Spending Power, and The Rise of 18 U.S.C. § 666*, 73 Notre Dame L. Rev. 247, 280 (1998) ("[T]he legislative history, fairly read, [supports] the interpretation that Congress intended to deal with a relatively narrow problem, specified forms of malfeasance in connection with the administration of federal assistance."); 4 Department of Justice Manual 9-1581 ("Congress created 18 U.S.C. § 666 to ensure the integrity of Federal program funds administered through private organizations and state, local, or Indian tribal government agencies."); 4 Department of Justice Manual 9-1593 ("Courts have interpreted [§ 666(b)] to require that the organization receive and administer the $10,000 in benefits, rather than merely be an indirect beneficiary."); *United States* v. *Zyskind*, 118 F.3d 113, 116 (2d Cir. 1997) ("Nothing in this language suggests that § 666 does not reach thefts by an agent of an organization that receives federal program moneys and administers those moneys for the benefit of program beneficiaries.").

In fact, Respondent readily concedes this fact: "The

broad language of Section 666 was enacted to ensure federal authority to prosecute acts of bribery involving agents of state and private entities that *administered* federal assistance programs." Gov't Br. 6-7 (emphasis added).

The legislative history of § 666 memorializes Congress' specific intent that "not every Federal contract or disbursement of funds would be covered. For example, if a government agency lawfully purchases more than $10,000 in equipment from a supplier, it is not the intent of this section to make a theft of $5,000 or more from the supplier a Federal crime. It is, however, the intent to reach thefts and bribery in situations of the types involved in the *Del Toro*, *Hinton*, and *Mosley* cases." S. Rep. No. 98-225, at 370 (1984), *reprinted in* 1984 U.S.C.C.A.N. 3182, 3510. The statute, therefore, should be construed in light of those three cases.

In *Del Toro*, *Hinton*, and *Mosley*, the government had provided a non-federal entity with federal funding for its operational expenses and then *also* charged that entity with administering federal funds under a specific federal program. The briberies at issue were committed in relation to the administration of those funds. *United States* v. *Del Toro*, 513 F.2d 656 (2d Cir. 1975) (bribery of a city agency that the government funded and then charged with administering federal monies under the HUD program); *United States* v. *Hinton*, 683 F.2d 195 (7th Cir. 1982) (bribery of a community-based non-profit corporation that was funded by and charged with

administering federal monies under the HUD program), *aff'd*, 465 U.S. 482 (1984); *United States* v. *Mosley*, 659 F.2d 812 (7th Cir. 1981) (bribery of a state program funded entirely by the government and charged with administering federal monies under the CETA program).[2]

Here, the hospital did not administer any federal funds under the Medicare program. The hospital was simply reimbursed for services it provided to Medicare beneficiaries. In other words, once title to the money passed to the hospital in the ordinary course of the business transaction, the hospital had no obligation to further administer the money on behalf of the Medicare program beneficiaries. It could allocate the funds as it wished. Additionally, the alleged bribery at issue here (bribery to obtain a loan from the hospital) was wholly unrelated to the provision of -- or compensation for -- those health care services. Moreover, *Del Toro*, *Hinton*, and *Mosley* did not involve situations where an entity merely received payments for services provided under a federal assistance program.

Hypothetically, § 666 might apply where a hospital

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[2] This aspect of the legislative history -- Congress' obvious intent to "fill gaps" in the federal bribery laws to reach quasi-public or private entities administering funds under federal programs -- explains precisely why application of § 666 to hospitals is so limited. Unlike HUD and CETA programs, hospitals are pure service providers. They are paid by government funds, but they do not have any additional administrative responsibilities with respect to those funds. Their responsibilities are simply to provide services and receive compensation for those services. Such responsibilities were never intended to come within the scope of § 666.

received a grant from the federal government, was charged with administering that grant, and an individual paid a bribe to a hospital agent to persuade the agent to award him a portion of the grant money during the grant administration process. Similarly, § 666 might apply where an intermediary charged with administering funds under the Medicare program is bribed in connection with the administration of those funds.[3]

The legislative history of § 666 also memorializes Congress' intent "to augment the ability of the United States to vindicate significant acts of theft, fraud, and bribery involving Federal monies that are disbursed to private organizations or State and local governments pursuant to a Federal program." S. Rep. No. 98-225, at 369 (1984), *reprinted in* 1984 U.S.C.C.A.N. 3182, 3510. According to Congress, the purpose of § 666 is "to protect the integrity of the vast sums of money distributed through Federal programs from theft, fraud, and undue influence by bribery." *Id.* at 370.

Respondent maintains that "[p]etitioner's conduct in

[3] Respondent clearly miscomprehends the role of the intermediary when it states: "A hospital providing medical assistance with federal funds intended for that purpose is no different from a fiscal intermediary for purposes of Section 666." Gov't Br. 18. Petitioner submits that for the purposes of § 666 a hospital and an intermediary are antipodal. A hospital provides medical services and is paid for those services from the federal government under the Medicare program. An intermediary receives funds from the government and, as an agent for the government, is responsible for administering those funds to the various health care providers who provide services to Medicare beneficiaries.

obtaining a loan from WVHA, a Medicare [service] provider, by fraud and giving a kickback to WVHA's chief financial officer threatened the integrity of the Medicare program in which WVHA participated." Gov't Br. 15-16. Respondent argues further that "[t]he sound administration of the program relies on officials at participating hospitals who will not be swayed by improper influences that interfere with providing medical care to patients or that drive up the costs of the program." Gov't Br. 16.

The fatal flaw in Respondent's argument, however, is that the loan from WVHA and the alleged attendant kickback had absolutely no connection to the federal Medicare program. The loan and kickback were wholly unrelated to the delivery of -- and compensation for -- health care services to patients. Fischer's and Caddick's conduct did not -- and could not -- in any way compromise the integrity of program funds. While a hospital may incur many business expenditures and losses, the only expenditures and losses considered by Medicare for reimbursement purposes are those that have an impact on patient care. See 42 C.F.R. § 413 *et seq.* (setting forth the principles of reasonable Medicare cost reimbursement).

Here, there indisputably was no theft, fraud, or bribery *involving* federal monies and, therefore, no threat to the integrity of the Medicare program.

III. PRECEDENTS CONSTRUING FEDERAL ANTI-DISCRIMINATION STATUTES ARE NOT DISPOSITIVE OF THIS CRIMINAL CASE.

The manner in which hospitals have been treated under the federal anti-discrimination statutes is not dispositive of the issue before this Court. The Court has recognized that it must exercise particular restraint in interpreting federal criminal statutes. *Dowling* v. *United States*, 473 U.S. 207, 213 (1985). Accordingly, a criminal statute cannot be interpreted based on precedents arising in the civil context. Additionally, as other courts have recognized, there are inherent policy differences between the civil anti-discrimination laws and 18 U.S.C. § 666. *United States* v. *LaHue*, 170 F.3d 1026, 1029 (10th Cir. 1999); *United States* v. *Wyncoop*, 11 F.3d 119, 123 (9th Cir. 1993).

IV. RESPONDENT'S INTERPRETATION OF 18 U.S.C. § 666 VIOLATES THE FUNDAMENTAL PRECEPTS OF FEDERALISM AND EXCEEDS CONGRESS' AUTHORITY UNDER THE SPENDING CLAUSE.

The Court has instructed that statutes should not be interpreted in a manner that significantly alters the federal-state balance unless Congress clearly indicated its intent to do so. *United States* v. *Bass*, 404 U.S. 336, 349 (1971). The interpretation of § 666 advanced by Respondent is contrary to the fundamental precepts of federalism and exceeds Congress' authority under the Spending Clause.

Respondent's interpretation of § 666 would extend federal jurisdiction to any fraud or bribery involving an organization that received $10,000 in payments from the federal government. Such a construction "would make a federal offense out of routine local bribery, dramatically changing the state-federal balance without an express Congressional directive that it intended to do so." *United States* v. *Zwick*, 199 F.3d 672, 680 (3d Cir. 1999).

For example, a cashier's theft of $5,000 from a cash register of a grocery store that receives more than $10,000 in payments under the food stamps program could be prosecuted as a federal crime under § 666. Similarly, a bribery of an employee who works in the food services division of a hospital that receives more than $10,000 in Medicare payments could be prosecuted federally under § 666. Additionally, a clerk's theft of $5,000 from the safe of a college that receives more than $10,000 in federal educational loans could be prosecuted under § 666 in federal court. Finally, an employee in the laundry room of a hospital who steals a $5,000 automobile owned by the hospital, which happens to receive more than $10,000 in Medicare funds, could be prosecuted federally under § 666. Certainly, these offenses cannot be what Congress envisioned as "federal program theft or bribery." Such a result is clearly contrary to our federal system of government which acknowledges that "preventing and dealing with crime is much more the business of the States than it is of the Federal Government." *Patterson* v. *New York*, 432 U.S. 197, 201

(1977).

Respondent's interpretation of the statute also exceeds Congress' authority under the Spending Clause, U.S. Const. art. I, § 8, cl. 1. To pass muster under the Spending Clause, legislation regulating the behavior of entities receiving federal funds must, *inter alia*, be based on a federal interest in the particular conduct to be regulated. *South Dakota* v. *Dole*, 483 U.S. 203, 207 (1987).

Respondent maintains that "Congress has a substantial interest in ensuring that its federal program funds are not dissipated or impaired by acts of fraud or corruption." Gov't Br. 9. In the instant matter, the Medicare funds were in no danger of being dissipated or impaired by Petitioner's alleged acts of fraud or corruption. The transaction sought to be influenced by Petitioner had absolutely no connection to the federal Medicare program. It involved a loan from the hospital's general funds. Loss on such a loan could never be recouped as a hospital cost through Medicare reimbursement. The hospital -- and solely the hospital -- bore the risk. See 42 C.F.R. § 413 *et seq.* (setting forth the principles of reasonable Medicare cost reimbursement). There was simply no impact on the Medicare program. *Salinas* v. *United States*, 118 S. Ct. 469, 474 (1997) (leaving open the question of to what extent the statute requires some "kind of connection" between a bribe and the expenditure of federal funds). Accordingly, there simply was no federal interest at stake -- let alone a substantial,

identifiable or significant interest. 4 Department of Justice Manual 9-297 ("As a matter of Department policy, Federal prosecutors should be prepared to demonstrate that a violation of 18 U.S.C. § 666 affects a substantial and identifiable Federal interest before bringing charges. This policy ensures that Federal prosecutions will occur only when significant Federal interests are involved.").

Finally, Respondent argues that "under [P]etitioner's construction of the word 'benefits,' Section 666 would not apply even to those acts of fraud, bribery, or theft by a hospital official that directly affected Medicare funds." Gov't Br. 33. Petitioner does not agree entirely with that conclusion, and, in any event, it was not a concern of Respondent's previously. Scenarios are easily imagined in which a hospital official bribes the intermediary in connection with its administration of Medicare funds. Such conduct could potentially fall within the ambit of the statute. Respondent, however, already has admitted that § 666 "has limited practical significance." Gov't Cert. Opp'n 10. According to Respondent, "[f]raud involving organizations that receive Medicare funds ordinarily may be prosecuted under other federal criminal statutes, such as mail or wire fraud, 18 U.S.C. 1341, 1343; the Medicare anti-kickback statute, 42 U.S.C. 1320a-7b; or the statute prohibiting theft or embezzlement in connection with health care, 18 U.S.C. 669." Gov't Cert. Opp'n 10. As Respondent readily acknowledges, Congress has enacted laws to address offenses involving the Medicare program. Section 666 should not be expanded

improperly to apply to situations that it simply was not intended to address.

CONCLUSION

For the foregoing reasons, Mr. Fischer respectfully requests that the opinion of the United States Court of Appeals for the Eleventh Circuit be reversed and that his convictions under 18 U.S.C. § 666 and 18 U.S.C. § 1957, which were premised on § 666, be reversed. Furthermore, Mr. Fischer requests that the case be remanded for further proceedings as outlined in his opening brief on the merits.

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QUESTION PRESENTED

Whether Medicare payments to a hospital for services provided to Medicare patients qualify as "benefits" to meet the jurisdictional requirements of Title 18 U.S.C. § 666 so as to federalize crimes of theft, embezzlement, and bribery involving the hospital?

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INTEREST OF *AMICUS CURIAE* [1]

The National Association of Criminal Defense Lawyers ("NACDL") submits this *amicus curiae* brief in support of the Petitioner, Jeffrey Allan Fischer. The NACDL is a nonprofit corporation with more than 10,000 lawyer-members and 28,000 affiliate-members in all 50 States. The American Bar Association recognizes the NACDL as an affiliate organization and awards it full representation in the ABA's House of Delegates.

The NACDL was founded in 1958 to promote criminal-law research, to disseminate and advance knowledge in the area of criminal practice, and to encourage integrity, independence, and expertise among criminal-defense counsel. The NACDL is particularly dedicated to advancing the proper administration of justice and to ensuring that criminal statutes are construed and applied in accord with the United States Constitution.

This case involves the interpretation and application of a relatively novel federal criminal statute, 18 U.S.C. § 666.[2] We believe the Court of Appeals' expansive reading of this statute disregards its plain language, its legislative history,

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[1]The parties have consented to the submission of this *amicus curiae* brief. Their letters of consent have been filed with the Clerk of this Court. None of the parties authored this brief in whole or in part and no one other than *amicus curiae*, its members, or its counsel contributed money or services to the preparation or submission of this brief. *See* S. Ct. Rule 37.6.

[2]*See generally* Daniel N. Rosenstein, Note, "Section 666: The Beast in the Federal Criminal Arsenal," 39 Cath. U. L. Rev. 673 (1990); George D. Brown, "Stealth Statute: Corruption, The Spending Power, and the Rise of Section 666," 73 Notre Dame L. Rev. 247 (1998).

and the traditional canons for interpreting federal criminal statutes. This reading is misguided as a matter of construction, creates serious federalism-based concerns, and could undermine the States' primary role in criminal-law enforcement.[3] The NACDL urges this Court to re-affirm the principle that courts should exercise restraint in construing federal criminal statutes, thereby preserving our system of enumerated powers and dual sovereignty and the individual liberties that system was designed to protect.

INTRODUCTION

This case presents a question of statutory interpretation that is clear and straightforward but at the same time of great constitutional importance. The decision below flies in the face of the relevant statute's plain meaning, *see* 18 U.S.C. § 666(b), and disregards established canons of construction and "first principles" of our Nation's constitutional federalism. *United States v. Lopez*, 514 U.S. 549, 552 (1995); *see also South Dakota v. Dole*, 483 U.S. 203, 207 (1987) ("The spending power is of course not unlimited . . . , but is instead subject to several general restrictions[.]").

Generally speaking, commercial bribery is not a federal crime. Before purely local criminal activity may be subject

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[3]*See generally* ABA Task Force on the Federalization of Criminal Law, The Federalization of Criminal Law 56 (1998) (arguing that the health of our constitutional system of dual federalism depends on halting "inappropriate federalization"); Committee on Long Range Planning of the Judicial Conference of the United States, Proposed Long Range Plan for the Federal Courts 19 (Nov. 1994) ("If federal courts were to begin exercising . . . the broad range of subject-matter jurisdiction traditionally allocated to the states, they would lose both their distinctive nature and . . . their ability to resolve fairly and efficiently those cases of clear national import and interest[.]").

to federal penalties, the Constitution requires *some* federal "jurisdictional hook,"[4] such as, for example, an effect on or connection with interstate commerce. *See, e.g.*, 18 U.S.C. §§ 201 ("Bribery of public officials and witnesses"), 214 ("Offer for procurement of Federal Reserve bank loan"), 224 ("Bribery in sporting contests"). Here, Section 666 makes it a federal crime to offer or receive a bribe in connection with the business of any "organization" that "receives, in any one year period, benefits in excess of $10,000 under a Federal program involving . . . Federal assistance." 18 U.S.C. §§ 666(a)(1)-(2), (b). It is the "recei[pt]" of more than $10,000 in federal-assistance-program "benefits" that ensures a sufficient federal interest in what would otherwise only be a state-law offense. Thus, that "receipt" of program "benefits" is Section 666's statutorily *and constitutionally* required "jurisdictional hook."

This case is about that jurisdictional hook. It is about the meaning of the words "receives," "benefits," and "assistance." This Court must decide whether bribes relating to the business of an organization – in this case, a health-care facility – that does *not* itself "receive[]" "benefits" under a federal "assistance" program, but that *does* get paid for services from people who *themselves* "receive[]" financial "benefits" under such a program, are federal crimes. Put simply, would Section 666 apply to a bribe offered to the proprietor of a corner grocery store that "receive[d]" more than $10,000 in food stamps from its low-income patrons who are beneficiaries of the food-stamp program? *See United States v. LaHue*, 998 F. Supp. 1182, 1187 (D.Kan.

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[4]*See generally*, Richard W. Garnett, "Once More Into the Maze: *United States v. Lopez*, Tribal Self-Determination, and Federal Conspiracy Jurisdiction in Indian Country," 72 N. D. L. Rev. 433, 449-450 (1996) (discussing "jurisdictional hooks" in federal criminal law).

1998) ("[N]early every large grocery store chain directly receives more than $10,000 in food stamps as payment from customers. . . . [S]urely a checkout clerk's theft of $5,000 in cash from a cash register does not constitute federal program fraud."), *aff'd*, 170 F.3d 1026 (10th Cir. 1999). The Court of Appeals for the Eleventh Circuit, in effect, answered "yes" to this question. *United States v. Fischer*, 168 F.3d 1273 (11th Cir. 1999). But this simply cannot be the law.

The relevant facts can be summarized quickly:[5] The Petitioner, Jeffrey Allan Fischer, was convicted under Section 666. Pet. App. 1-2. The government charged that Mr. Fischer arranged for a $10,000 "kickback" (Pet. App. 5) to be paid to the Chief Financial Officer of the West Volusia Hospital Authority ("WVHA") in return for a $1.2 million loan from WVHA to Quality Medical Consultants, Inc., of which Mr. Fischer was President and part owner. Pet. App. 3-5. But again, because bribery, standing alone, is not a federal crime, "[t]o establish that Fischer had violated 18 U.S.C. §§ 666(a)(1) and (a)(2), the Government was required to prove that WVHA was an agency receiving, in any one year period, benefits in excess of $10,000 under a federal assistance program. 18 U.S.C. § 666(b)." Pet. App. 6.

To meet this burden, the Government introduced testimony that "WVHA had collected between ten and fifteen million Medicare dollars in 1993." *Ibid.* The government did not present any evidence showing whether these Medicare payments were disbursed under Medicare "Part A" or "Part B" (Pet. App. 14); that is, the government's evidence "did not clearly establish whether WVHA received funds directly from the Medicare program or received funds as an

[5]*See generally* Pet. App. 1-8.

assignee under Part B or even Part A of the federal program."[6] *Ibid.* Thus, the Court of Appeals observed, "there is a possibility in this case that WVHA received funds directly from the Medicare program without having been assigned the right to receive those funds by a patient." Pet. App. 14. However, the Court of Appeals stated clearly that "*even if* the WVHA received funds as an assignee, the plain language of Section 666(b) does not distinguish between an organization, government, or agency that receives 'benefits' directly under a federal program and an organization, government, or agency that receives 'benefits' as an assignee under a federal program." Pet. App. 14 (emphasis added).[7]

[6]As the Court of Appeals observed, "[t]he Medicare program is divided into two parts, Part A and Part B. *See* 42 U.S.C. § 1395, *et seq.*" Pet. App. 13 n.9. The Court of Appeals for the Tenth Circuit described recently the differences between these two "parts" of the program: "Payment by Medicare under Part A for services rendered by a hospital or other institution may only be made to the institution, and the institution may not bill the patient directly, except for deductibles and coinsurance . . . . Under Part B, a physician may either request direct payment by patients on the basis of an itemized bill or accept assignment agreements. . . . This assignment scheme implies that the intended beneficiary of Medicare Part B is the patient." *United States v. LaHue*, 170 F.3d 1026, 1027-1028 n.3 (10th Cir. 1999).

[7]In our view, it makes no difference whether the Medicare funds were "assigned" by the program's beneficiaries to the health-care facility or were sent directly by the government to the facility in exchange for services provided to the beneficiaries. Under *both* Parts of Medicare, it is the *patient*, and not the health-care provider, that is the beneficiary and who "receives" "benefits" under that federal assistance program The relevant Medicare-related provisions make this clear. Under Part A, "[t]he benefits provided to an individual by the insurance program under this part shall consist of entitlement to have payment made on his behalf." 42 U.S.C. § 1395d(a). *See also* 42 U.S.C. §§ 1395k(a)(1), 1395u(a) ("individuals" receive "benefits" under Part B).

The Court of Appeals stated that Section 666's "use of the term 'benefits' serves to emphasize not that the recipient must be a 'target recipient,' but rather that the funds must have been received by the organization, government, or agency as part of an 'assistance' program, rather than a purely commercial transaction – the federal government's purchase of goods from a contractor, for example." Pet. App. 14-15 (citing *United States v. Copeland*, 143 F.3d 1439 (11th Cir. 1998)). The court held that the constitutionally and statutorily required jurisdictional hook – that the "organization" (here, the WVHA) "receive[d]" at least $10,000 in "benefits" under a federal "assistance" program – was established *solely*[8] on the basis of the funds the WVHA received as payment for services provided to that the Medicare program's beneficiaries. *See* Pet. App. 10-12, 14.

Less than three weeks after the Court of Appeals' ruling below, the Tenth Circuit reached the opposite conclusion, holding that payments to a health-care organization for services provided to Medicare Part B beneficiaries were *not* "benefits" "receive[d]" under Section 666(b):

> We conclude that Congress intended the reference in section 666(b) to an organization receiving federal program benefits to mean one that receives benefits before final distribution to the intended beneficiary, here the patient. *What happens to the funds once the patient receives them is beyond the scope of section 666.* Thus, any assignment of such funds to a third party does not constitute a receipt of federal program benefits within the reach of section 666.

United States v. LaHue, 170 F.3d 1026, 1031 (10th Cir. 1999) (emphasis added). This Court granted certiorari to resolve this conflict. *Fischer v. United States*, 120 S. Ct. 395 (Nov. 1, 1999) (No. 99-116).

[8]There was no evidence presented that the WVHA administered any programs or disbursed any funds for or on behalf of the United States.

SUMMARY OF THE ARGUMENT

We agree with the Petitioner that the Court of Appeals misread Section 666(b). Section 666 was designed to protect the integrity of federal funds by outlawing bribery in connection with the administration of those funds, and the plain meaning of the language the statute employs is adequate to achieve that purpose. The Court of Appeals, on the other hand, exploded the well defined limits that the statute's text imposes on federal jurisdiction over local bribery and embraced a reading that severely disrupts the Constitution's "delicate balance" between state and federal power. *Gregory v. Ashcroft*, 501 U.S. 452, 460 (1992). The rationale of the decision below has no logical stopping point. *See Lopez*, 514 U.S. at 563 ("[I]f we were to accept the Government's arguments, we are hard pressed to posit any activity by an individual that Congress is without power to regulate.").

The Court of Appeals' interpretation of Section 666(b) is inconsistent with the plain meaning of the statute's terms. Moreover, even if the provision or its terms were ambiguous, the decision below could not be reconciled with longstanding canons of statutory construction and "first principles" of constitutional federalism. The spending power enjoyed by Congress under Article I does not permit the federal government to nationalize all local bribery prosecutions

absent *some* connection with the integrity of a federal program. The judgment of the Court of Appeals should be reversed.

ARGUMENT

I.

FEDERAL PAYMENTS TO A HOSPITAL FOR HEALTH-CARE SERVICES PROVIDED TO MEDICARE BENEFICIARIES ARE NOT "BENEFITS" UNDER 18 U.S.C. § 666(b).

The Court of Appeals validated a reading of Section 666 in which federal criminal jurisdiction lives like a virus in all program funds disbursed by the United States, wherever they go, however they are spent, and whoever eventually benefits from them.[9] We recognize, of course, that Congress used "expansive, unqualified" language when it outlawed bribery involving organizations that receive federal benefits or administer federal funds, *Salinas v. United States*, 118 S. Ct. 469, 473 (1997), but even "expansive" language has limits. *See Copeland*, 143 F.3d at 1441 ("The scope of § 666 . . . is not limitless."). The Court of Appeals' reading cannot be sustained.

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[9]*See* David E. Engdahl, "The Spending Power," 44 Duke L. J. 1, 92 (1994) ("Money cannot infect the recipient with the germ of generalized federal government control, or an infectious virus capable of spreading that disease to anyone who touches the recipient or its property.").

A. The Decision Below Is Inconsistent with the Plain Meaning of Section 666(b).

Just two Terms ago, this Court emphasized – in its only other Section 666 case – that "[c]ourts in applying criminal laws generally must follow the plain and unambiguous meaning of the statutory language. Only the most extraordinary showing of contrary intentions in the legislative history will justify a departure from that language." *Salinas*, 118 S. Ct. at 474 (internal quotation marks and citations omitted); *Ardestani v. INS*, 502 U.S. 129, 135 (1991) (courts may deviate from a statute's plain language only in "rare and exceptional circumstances"); *United States v. Turkette*, 452 U.S. 576, 580 (1981) ("If the statutory language is unambiguous, in the absence of a clearly expressed legislative intent to the contrary, that language must ordinarily be regarded as conclusive.") (citation and internal quotation marks omitted). The plain-language rule reflects, as Chief Justice Marshall emphasized, a respect not only for the means chosen by legislators but also for "the rights of individuals." *United States v. Wiltberger*, 18 U.S. (5 Wheat.) 76, 95 (1820) ("The rule that penal laws are to be construed strictly, is perhaps not much less old than construction itself. . . . It is the legislature, not the Court, which is to define a crime, and ordain its punishment.").

The Court of Appeals concluded – based "*entirely* on the plain language of [the statute]" – that "WVHA received a type of 'benefits' expressly covered by Section 666(b)." Pet. App. 11 (emphasis added). In fact, though, the "plain language" of the statute requires reversal.

Section 666(b) defines the class of bribes that do not involve federal officials but are nonetheless federal crimes.[10] These bribes must involve an "organization, government, or agency" that "receives, in any one year period, benefits in excess of $10,000 under a Federal program involving . . . Federal assistance." 18 U.S.C. § 666(b). There is no question here whether WVHA is an "organization" nor, we think, is there any dispute whether the Medicare program – Part A or Part B – is a "Federal program involving Federal . . . assistance." What's more, it can be conceded that funds disbursed through the Medicare program are "benefits" – *"benefits" that are "receive[d]" as "assistance" by the program's beneficiaries, the patients.*

Thus, the question in this case is *not* whether the Medicare program disburses "benefits" – of course it does – but whether health-care providers like WVHA "receive[]" "benefits" when they are *paid* (whether by assignment or directly) for providing valuable services to Medicare beneficiaries. In other words, do "benefits" *stay* "benefits" forever -- do funds once disbursed through a federal program bear forever the federal brand[11] -- or do they ever, through exchange in commerce, become just regular, everday "money"?

"Benefit," Webster notes, comes from the Latin *bene factum*; its original English meaning is "an act of kindness."

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[10]"Before § 666 was enacted, the federal criminal code contained a single, general bribery provision codified at 18 U.S.C. § 201. Section 201 by its terms applied only to public official[s][.]" *Salinas*, 118 S. Ct. at 474.

[11]*Compare* Genesis 4:15 (God "put a mark on Cain, lest any who came upon him should kill him").

Webster's Third New Int'l Dictionary 204 (1986) ("benefit"). Its modern noun usages include "something that guards, aids, or promotes well being"; "useful aid"; "help"; and "financial help in time of sickness, old age, or unemployment." Given these definitions, "benefits" describes quite accurately what it is that America's elderly and disabled "receive[]" from the federal government through Medicare. It does not at all describe, though, what it is that the health-care *providers* "receive[]." When WVHA "receives" funds *from* the Medicare program's beneficiaries (whether by assignment from the beneficiaries themselves or from the government directly on their behalf), it does *not* "receive[]" "useful aid" or "financial help in time of sickness." Rather, it "receives" *compensation in exchange for services rendered. See Copeland*, 143 F.3d at 1441 ("[O]rganizations engaged in purely commercial transactions with the federal government are not subject to § 666.").

Payments "receive[d]" by health-care providers like WVHA as a result of the Medicare program's disbursements – however such disbursements might be characterized when received by the program's beneficiaries, the patients – are simply not "benefits" "receive[d]" under a Federal "assistance" program, even if these providers do "benefit" from the government's involvement in the health-care market. The manufacturers and sellers of consumer goods that senior citizens can afford and live to enjoy, thanks to Medicare, also "benefit" in this sense, but no one thinks Cadillac is an "organization" under Section 666. Grocery stores obviously "benefit" from the funds disbursed through the federal food-stamp program, and food-stamps are clearly "benefits" to someone, but the stores do *not* "receive[]"

"benefits" within the meaning of Section 666(b).[12] Were it otherwise, where would it end?

The Court of Appeals failed to appreciate that Section 666(b) does not ask simply whether given monies are, at some point, to someone, "benefits," but instead focuses on whether federal-program "benefits" are "receive[d]" under a federal "assistance" program. The Court of Appeals concluded that "WVHA's receipt of between ten and fifteen million dollars in Medicare funds qualified as receipt of 'benefits' under a federal assistance program[.]" Pet. App. 9. Rather than asking whether, *as received by the health-care provider*, the funds paid for health-care services rendered could fairly be viewed as federal-program "benefits," the Court of Appeals asked whether the funds were disbursed "under a program involving federal assistance" rather than as a "result of 'purely commercial transactions with the government.'" Pet. App. 10 (quoting *Copeland*, 143 F.3d at 1442). This is where the court erred. It assumed that because the Medicare program *does* provide "benefits," under a federal "assistance" program, *to its beneficiaries*, the Medicare funds paid to WVHA for services rendered remained "benefits" for Section 666 purposes. *See* Pet. App. 11 ("Because WVHA received payments under a federal

[12]*See United States v. LaHue*, 998 F. Supp. 1182, 1187 (D. Kan. 1998) ("[N]early every large grocery store chain directly receives more than $10,000 in food stamps as payment from customers[, but] a checkout clerk's theft of $5,000 in cash from a cash register does not constitute federal program fraud."), *aff'd*, 170 F.3d 1026 (10th Cir. 1999). *United States v. Wyncoop*, 11 F.3d 119, 123 (9th Cir. 1993) ("Yet there is no more reason to conclude that Congress in enacting Section 666 intended to bring employees at every college and university in the country within the scope of potential federal criminal jurisdiction than it is to assume that Congress wished to reach employees of every grocery store.").

assistance program, WVHA received a type of 'benefits' expressly covered by § 666(b).").

En route to this mistaken interpretation, the Court of Appeals took pains to reject the "narrow" (Pet. App. 12) reading of Section 666(b) adopted by the District Court in *United States v. LaHue*, 998 F. Supp. 1182 (D. Kan. 1998), and affirmed by the Tenth Circuit, 170 F.3d 1026 (10th Cir. 1999). The court in *LaHue* had correctly concluded that although, under Medicare, health-care providers "ultimately receive funds traceable to a federal program, [they] do so only through patient payments or assignments." 998 F. Supp. at 1187. In the *LaHue* court's view, these funds ceased to be "benefits" after they reached the Medicare program's "target recipients." *Id.* at 1187-88; *see* Pet. App. 13.[13] The Court of Appeals in this case disagreed: "[T]he use of the term 'benefits' serves to emphasize not that the recipient must be a 'target recipient', but rather that the funds must have been received by the organization . . . as part of an 'assistance' program, rather than a purely commercial transaction – the federal government's purchase of goods from a contractor, for example." Pet. App. 14-15.

The Court of Appeals was wrong, and the *LaHue* court was right, for at least two reasons: *First*, the Court of Appeals' reading completely misses the point that, although it is true that Section 666(b) requires the receipt of "benefits" under a federal assistance program, it still requires, more fundamentally, that the "organization" in question

[13]The *LaHue* court reached this conclusion after turning to the statute's legislative history. We agree with the court's interpretation, but believe that this interpretation is compelled by the plain, unambiguous meaning of the statute's terms and confirmed by the legislative history.

"receive[]" the "benefits." The question, then, is not so much whether the statute says explicitly that the "organization must be the target recipient" – it doesn't – but whether the funds received by the hospital as compensation for services rendered can meaningfully be called "benefits."

Second, the Court of Appeals completely overlooked the fact that Section 666 is not satisfied simply when an organization receives federal funds. The organization must receive "benefits," and the term "benefits" must be read in light of the words that follow: "under a Federal program involving . . . *Federal assistance*." The maxim "*noscitur a sociis*" – "a word is known by the company it keeps" – is relevant here. *Jarecki v. G.D. Searle & Co.*, 367 U.S. 303, 307 (1961) (noting that this maxim "is often wisely applied where a word is capable of many meanings in order to avoid the giving of unintended breadth to the Acts of Congress").

Under the Medicare program, elderly citizens receive a "benefit" – they receive help and aid under an "assistance" program. But the health-care providers who serve these citizens do not, to put it crudely, get aid, they get *paid*. They "receive" funds in the market, not under an "assistance" program. So far as a health-care provider is concerned, the fact that a patient's bills are being paid by Uncle Sam no more converts those payments into federal *largesse* than if the bills were paid by the patient's Aunt Edna. The payments are, from the perspective of the provider, *precisely* the kind of "purely commercial transaction" that the Court of Appeals conceded Section 666 does not reach, and the funds received from patients in payment for medical services are no more federal-program "benefits," or "assistance," than a check drawn on a patient's checking account into which he deposits his federal military pension.

B. Even if Section 666(b) Were Ambiguous, the Decision Below Could Not Be Sustained.

The meaning of Section 666(b)'s language is clear, and that is reason enough to reverse the decision below. But even if this Court were to find some ambiguity in the meaning of the "benefits" that must be "receive[d]" under a Federal "assistance" program, the best course would still be to reject the untethered and boundless interpretation adopted by the court below, because it conflicts not only with the statute's legislative history but also with established background interpretive principles and canons of construction.[14]

First of all, as the *LaHue* court's food-stamps hypothetical shows, *supra*, the interpretation adopted below yields patently absurd results. This would be reason enough to reject the Court of Appeals' reading, even if that reading were consistent with the language of the statute. *United States v. X-Citement Video, Inc.*, 513 U.S. 64, 69 (1994) ("Some applications of respondents' position would produce results that were not merely odd, but positively absurd."); *Liteky v. United States*, 510 U.S. 540, 550 (1994) (noting that a proposed interpretation "produces results so intolerable as to be absurd"); *Chapman v. United States*, 500 U.S. 453, 476 (1991) ("There is nothing in our jurisprudence that compels us to interpret an ambiguous statute to reach such an absurd result."); *Turkette*, *supra*, at 580 ("[A]bsurd results are to be avoided[.]").

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[14]We emphasize that we are *not* suggesting that this Court should turn to legislative history or interpretive principles in order to *avoid* the plain meaning of the statute. *Cf. Salinas*, 118 S. Ct at 474.

The untenable implications of the Court of Appeals' interpretation were recognized by the court in the leading case on the question presented here. The Tenth Circuit in *LaHue*, *supra*, noted that "[u]nder the government's theory, any organization that is assigned $10,000 in a year in funds initially disbursed under a federal program source would fall within the statute." Pet. App. 26. It follows from this premise, though, that "if the recipient physician endorsed Medicare checks to pay a supplier of medical goods, the supplier would be receiving benefits from a federal program. As the district court aptly noted, this construction creates almost a limitless statutory reach beyond a plain commonsense interpretation of the statute." *Ibid* (citing *LaHue*, 998 F. Supp. at 1187).

It is also worth noting here that if the Court of Appeals is right, and funds once in the hands of the federal government retain forever their character as federal "benefits," even after they are disbursed to and perhaps spent by a federal program's beneficiaries, then it would seem that a number of this Court's leading Establishment Clause cases have been wrongly decided. In a long line of decisions, this Court has held that government funds distributed to individuals through religion-neutral public-benefit programs *lose* their government character when those individuals independently decide to direct those funds to religious uses or institutions.[15] But if the Court of Appeals' reading of Section 666(b) were correct, the fact that, for example, that Mr. Witters and not the State of Washington decided to spend government

[15] *Agostini v. Felton*, 521 U.S. 203 (1997); *Zobrest v. Catalina Foothills Sch. Dist.*, 509 U.S. 1 (1993); *Witters v. Washington Dep't of Servs. for Blind*, 474 U.S. 481 (1986); *Mueller v. Allen*, 463 U.S. 388 (1983); *Board of Educ. v. Allen*, 392 U.S. 236 (1968); *Everson v. Board of Educ.*, 330 U.S. 1 (1947).

"benefits" on a religious education could not have prevented the government program through which those benefits were disbursed from violating the First Amendment. *See Witters v. Washington Dep't of Servs. for Blind*, 474 U.S. 481 (1986).

Second, it is well established that any "ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity." *Rewis v. United States*, 401 U.S. 808, 812 (1971); *see also United States v. Bass*, 404 U.S. 336, 348 (1971) ("[W]here there is ambiguity in a criminal statute, doubts are resolved in favor of the defendant."); *United States v. Universal C.I.T. Credit Corp.*, 344 U.S. 218, 221-222 (1952) ("[W]hen choice has to be made between two readings of what conduct Congress has made a crime, it is appropriate, before we choose the harsher alternative, to require that Congress should have spoken in language that is clear and definite."); *Dowling v. United States*, 473 U.S. 207, 229 (1985) (lenity is a "time-honored interpretive guideline"). The Court of Appeals' reading is inconsistent with this principle.

The rule of lenity serves, as this Court has observed, *see Bass*, 404 U.S. at 348, at least two important purposes: First of all, "a fair warning should be given to the world in language that the common world will understand, of what the law intends to do if a certain line is passed. To make the warning fair, so far as possible the line should be clear." *McBoyle v. United States*, 283 U.S. 25, 27 (1931). In addition, given our "instinctive distastes against men languishing in prison unless the lawmaker has clearly said they should," Henry J. Friendly, Benchmarks 202 (1967), and given that "criminal punishment usually represents the moral condemnation of the community, legislatures and not courts should define criminal activity." *Bass*, 404 U.S. at 348; *see also Bell v. United States*, 349 U.S. 81, 83 (1955) (rule of

lenity does not reflect "any sentimental consideration, or . . . want of sympathy with the purpose of Congress in proscribing evil or antisocial conduct. It may fairly be said to be a presupposition of our law to resolve doubts in the enforcement of a penal code against the imposition of a harsher punishment.").

This is not a case in which a criminal defendant invokes lenity based on "[t]he mere possibility of articulating a narrower construction," *Smith v. United States*, 508 U.S. 223, 239 (1993), or in order to "engraft an illogical requirement to [a statute's] text." *Salinas*, 118 S. Ct. at 478. The "narrower construction" advocated here is not a desperate gambit by defense counsel but the more natural reading of the text. Thus, even if there were any ambiguity in the meaning of the terms "receives," "benefits," and "assistance," as they are used in Section 666(b), that ambiguity should be resolved in favor of restraining, rather than expanding, that criminal statute's reach.

Third, and related, it is particularly important that courts interpret *federal* criminal statutes with care, and avoid adding to the already rampant "federalization" of crime that has so gravely upset the federal-state balance in recent years.[16] In other words, although courts generally and appropriately exercise restraint when interpreting ambiguous

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[16]The American Bar Association issued a report in late 1998 calling for "principled recognition by Congress of the long-range damage to real crime control and to the nation's structure caused by inappropriate federalization." ABA Task Force on the Federalization of Criminal Law, The Federalization of Criminal Law 56 (1998); *see also* James A. Strazzella and William W. Taylor, III, "Federalizing Crime: Examining the Congressional Trend to Duplicate State Laws," 14 Crim. Just. 4 (Spring 1999) (synopsis of the ABA's Task Force's Report).

terms in criminal statutes, that restraint becomes all the more important in cases involving the reach of a federal criminal statute. Courts should "not be quick to assume that Congress has meant to effect a significant change in the sensitive relation between federal and state criminal jurisdiction." *Bass*, 404 U.S. at 349. Instead, courts should require a "clear statement" that Congress intended to expand its own power into areas of traditional state concern. *Id.* at 349-350; *see also Gregory v. Ashcroft*, 501 U.S. 452, 460-461 (1992); *McNally v. United States*, 483 U.S. 350, 360 (1987).

Fourth, as we discuss in more detail below, the Court of Appeals' reading of Section 666(b) is so broad and so untethered – at least in many of its likely applications – to a federal interest in particular federal projects or programs, *see Dole*, 483 U.S. at 207-209, as to trigger the established canon of construction that statutes be read so as to eliminate constitutional doubts. *See, e.g., X-Citement Video*, 513 U.S. at 78; *Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988); *United States ex rel. Attorney General v. Delaware & Hudson Co.*, 213 U.S. 366, 408 (1909) ("[W]here a statute is susceptible of two constructions, by one of which grave and doubtful constitutional questions arise and by the other of which such questions are avoided, our duty is to adopt the latter."); *Murray v. Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64 (1804).

Finally, the legislative history and evident congressional purpose of Section 666 cut against the Court of Appeals' "viral" theory of the unbreakable link between once-federal money and federal criminal jurisdiction. As this Court observed in *Salinas*, Section 666 was enacted in response to a split in authority in the Courts of Appeals on whether state and local employees were "public officials"

within the meaning of the general federal bribery statute, 18 U.S.C. § 201. *Salinas*, 118 S. Ct. at 474.[17] Section 666 was "designed to extend federal bribery prohibitions to bribes offered to state and local officials employed by agencies receiving federal funds." *Ibid.*

There is *no* evidence, however, that Congress intended to federalize bribery generally, or to invite federal prosecution of bribes involving grocery stores that accept food stamps in exchange for their wares and hospitals that serve Medicare recipients. Instead, as the foremost scholar of Section 666 has observed, the relevant legislative history "support[s] the interpretation that Congress intended to deal with a relatively narrow problem, [namely,] specified forms of malfeasance in connection with the administration of federal assistance." *See* George D. Brown, "Stealth Statute: Corruption, The Spending Power, and the Rise of 18 U.S.C. § 666," 73 Notre Dame L. Rev. 247, 280 (1998). The Tenth Circuit similarly noted in *LaHue*, 170 F.3d at 1030 (Pet. App. 28), that:

> The legislative history reveals that although Congress intended "federal programs" to be broadly construed, Congress also intended to limit the statute to be consistent with its underlying purpose to "protect the vast sums of money distributed through federal programs from theft, fraud, and undue influence by

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[17] *See United States v. Del Toro*, 513 F.2d 656, 661-662 (2d Cir.); *United States v. Mosley*, 659 F.2d 812, 814-816 (7th Cir. 1981); *United States v. Hinton*, 683 F.2d 195, 197-200 (7th Cir. 1982), *aff'd sub nom., Dixson v. United States*, 465 U.S. 482 (1984).

> bribery." S. Rep. No. 98-225, at 370 (1984), *reprinted in* 1984 U.S.C.C.A.N. 3182, 3511.[18]

Thus, Congress' purpose for enacting Section 666 was "to augment the ability of the United States to vindicate significant acts of theft, fraud, and bribery involving Federal monies[.]" S. Rep. No. 98-225, at 369 (1984), *reprinted in* 1984 U.S.C.C.A.N. 3182, 3510. In so doing, Congress was careful to disclaim any such extravagant ambitions. It took pains to define the phrase "federal program" in Sec. 666(b) narrowly and to require a "specific statutory scheme authorizing the Federal assistance in order to promote or achieve certain policy objectives. Thus, not every Federal contract or disbursement of funds [is] covered." S. Rep. No. 98-225, *supra*, at 370.

There is nothing about this clear purpose of protecting the integrity of federal-program funds that requires recourse to the Court of Appeals' broad interpretation. It would do no violence to Section 666 – indeed, it would fulfill Congress' stated objective – to limit the statute's reach to bribes involving organizations that actually "receive[]" "benefits" through federal "assistance" programs. Congress determined that such bribes – and only such bribes – actually threaten the

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[18] *See also United States v. Wyncoop*, 11 F.3d 119, 123 (9th Cir. 1993) ("The statute . . . is not intended to do anything except protect the integrity of federal funds."); *United States v. Rooney*, 37 F.3d 847, 850-54 (2d Cir. 1994) ("666's manifest purpose is to safeguard finite federal resources from corruption and to police those with control of federal funds."); *Copeland*, 143 F.3d at 1441-1442 (relying on legislative history and insisting that "it is not the role of this Court to expand the scope of Section 666"); *United States v. Cicco*, 938 F.2d 441, 445 (3d Cir. 1991) (reviewing legislative history and concluding that Congress did not intend the statute to apply the defendants' solicitation of loyalty in exchange for municipal jobs).

integrity of the programs through which federal benefits are disbursed. But this case has nothing to do with the integrity of the Medicare program, or of those who administer it, or even of its beneficiaries. The Court of Appeals has read a statute designed to "vindicate significant acts of theft, fraud, and bribery involving Federal monies" as federalizing bribery involving any organization with which a federal-program beneficiary happens to do business.

II.

THE COURT OF APPEALS' INTERPRETATION OF SECTION 666(b) IS UNCONSTITUTIONAL.

Section 666(b)'s text provides a clear answer to the Question Presented in this case: Payments to a hospital for services provided to Medicare beneficiaries – whether those payments are made "directly" to the hospital by the government or "indirectly" (*i.e.*, are "assigned" by the beneficiary to the hospital) – are not "benefits" "receive[d]" by the hospital under a federal "assistance" program. Therefore, such payments *cannot* supply the basis for federal criminal jurisdiction over a run-of-the-mine commercial bribery case.

But this case also, in the words of one District Court, "raises the question of how far Congress has gone, and, under the Constitution, may go, to federalize crime." *United States v. McCormack*, 31 F. Supp. 2d 176, 177 (D. Mass. 1998). And so, even were the statute's language *not* clear, and even if there were evidence that Congress intended the broad reach conferred on Section 666 by the Court of Appeals, that court's expansion of federal criminal jurisdiction would so infringe "first principles" of dual sovereignty that this Court

would be required to reverse the Petitioner's conviction under Section 666 as unconstitutional.

A. Constitutional "First Principles" Circumscribe Federal Criminal Jurisdiction.

As the former Chief Judge of the Eighth Circuit, Judge Richard S. Arnold, has observed, "[o]ur Constitution is a charter for a federal government of limited powers, and under this charter the States possess primary authority for defining and enforcing the criminal law." *United States v. Delpit*, 94 F.3d 1134, 1149 (8th Cir. 1996) (internal quotation marks and citation omitted). In the same spirit, this Court has in recent years identified and enforced constitutional limits on Congress' power to expand federal regulatory power and jurisdiction.[19] It has been a persistent theme of this Court's

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[19] *See, e.g., Alden v. Maine*, 119 S. Ct. 2240 (1999); *College Savings Bank v. Florida Prepaid Postsecondary Educ. Expense Bd.*, 119 S. Ct. 2199 (1999); *Printz v. United States*, 521 U.S. 898 (1997); *City of Boerne v. Flores*, 521 U.S. 507 (1997); *Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996); *United States v. Lopez*, 514 U.S. 549, 552 (1995). This Court has also accepted several federalism cases for its October Term 1999. *See United States v. Morrison*, Nos. 99-5, 99-29 (Sept. 28, 1999) (whether provisions of the Violence Against Women Act exceed Congress' power under the Commerce Clause and Section 5 of the Fourteenth Amendment); *Reno v. Condon*, No. 98-1464 (May 17, 1999) (whether the Drivers' Privacy Protection Act is a valid exercise of Congress' power under the Commerce Clause or Section 5 of Fourteenth Amendment); *Kimel v. Florida Bd. of Regents*, Nos. 98-791, 98-796 (Sept. 28, 1999) (whether the Eleventh Amendment bars a private suit against a state under the Age Discrimination in Employment Act); *Vermont Agency of Natural Resources v. United States*, No. 98-1828 (June 24, 1999) (whether Eleventh Amendment immunity precludes a private relator from suing a state under the federal False Claims Act); *United States v. Jones*, No. 99-5739 (Nov. 15, 1999)(whether federal arson statute applies to arson

decisions that these are meaningful limits, and that Congress must "treat the States in a manner consistent with their status as residuary sovereigns and joint participants in the governance of the Nation." *Alden v. Maine*, 119 S. Ct. 2240, 2263 (1999).

In particular, the Court's 1995 decision in *United States v. Lopez*, *supra*, illustrates this Court's respect for the "first principles" of Our Federalism. In *Lopez*, the Court emphasized that "[t]he Constitution creates a Federal Government of enumerated powers[,]," 514 U.S. at 552, and – quoting Madison – reminded Congress and courts that "[t]he powers delegated by the proposed Constitution to the United States are few and defined. Those which are to remain in the State governments are numerous and indefinite." *Ibid* (quoting *The Federalist* No. 45, at 292-293 (C. Rossiter ed. 1961)).

Our dual-sovereignty structure, this Court made clear, is not a matter of mere administrative convenience; rather, the Framers limited the power of the federal government for a clear and crucial purpose – "to ensure protection of our fundamental liberties." *Ibid* (quoting *Gregory v. Ashcroft*, 501 U.S. 452, 458 (1991)). It is for this reason, among others, that the "States possess primary authority for defining and enforcing the criminal law." *Lopez*, 514 U.S. at 552, 561 n.3. The over-federalization of crime, however, "threatens to change entirely the nature of our federal system[.]" *See generally* Chief Justice William H. Rehnquist, Report to Congress (Jan. 1, 1999).

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of private residence and if such application is constitutional).

So, while it is unquestionably true that Congress has broad regulatory powers, there nevertheless remain real and justiciable lines – dictated by the Constitution – beyond which those powers cannot reach. *See, e.g.*, *City of Boerne v. Flores*, 521 U.S. 507, 516 (1997) ("Under our Constitution, the Federal Government is one of enumerated powers."). The Court of Appeals' interpretation of Section 666(b), and the Petitioner's conviction under that statute, crossed these lines. If, as the Court of Appeals believed, Section 666(b) extends federal bribery jurisdiction to transactions involving any organization that takes in, in the course of a year's business, at least $10,000 in funds that once upon a time passed through the federal coffers, then, for all practical purposes, the statute covers everything. *Lopez*, 514 U.S. at 564 ("[I]f we were to accept the Government's arguments, we are hard pressed to posit any activity by an individual that Congress is without power to regulate.").

B. Congress' Ability To Expand Criminal Jurisdiction Through the Spending Power Is Limited.

This Court's *Lopez* decision – like many of its recent federalism decisions – turned on the interpretation and application of the Commerce Clause.[20] Section 666, by contrast, was enacted pursuant to Congress' "Spending Power."[21] *See* Brown, *supra*, at 262; *see also, e.g.*, *United States v. Cantor*, 897 F. Supp. 110, 113 (S.D.N.Y. 1995).

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[20]This Court will return to the question of Congress' power to expand federal criminal jurisdiction using the Commerce Clause power in *United States v. Jones*, No. 99-5739, *supra*.

[21]Congress has the power to "provide for the common Defense and general Welfare of the United States," U.S. Const. art. I, § 8, cl. 1.

The federal government's ability to expand the reach of its regulatory authority by attaching conditions to the money it spends is no less subject to the "first principles" that guided this Court in *Lopez* than is its power to legislate pursuant to the Commerce Clause. Accordingly, in *South Dakota v. Dole*, 483 at 206-208, the Court identified specific restrictions on the extension of federal regulatory authority through conditions attached to federal spending, including a requirement that any such conditions must be related to the federal interest in the particular federal projects or programs through which the funds in question are disbursed. And although Congress' power to regulate what it funds is far-reaching, the restrictions outlined in *Dole* are real. Otherwise, "the spending power could render academic the Constitution's other grants and limits of federal authority." *New York v. United States*, 505 U.S. 144, 167 (1992) (under *Dole's* "relatedness" restriction, the conditions on federal spending must bear some relationship to the purpose of that spending.).

This Court has not yet had occasion to apply the *Dole* criteria in a criminal case. But courts are increasingly recognizing that, given the "first principles" of federalism emphasized in *Lopez* and the restrictions on conditional spending set out in *Dole*, the reach of Section 666 must be carefully controlled. For example, in *United States v. McCormack*, 31 F. Supp. 2d 176 (D. Mass. 1998), the District Court applied the *Dole* criteria – in particular, the "relatedness" requirement, *McCormack*, 31 F. Supp. 2d at 188 – to a Section 666 prosecution in a local-corruption case and held that in such a case the government must at least show that the bribe threatened the integrity of the program

through which the federal funds are disbursed. *Id.* at 189. The court stated:

> Directed by the concerns expressed in *Salinas* about applying § 666(a) to conduct that has no connection with the federal funds or programs, and the broader concerns of *Lopez* and *Bass*, I find that "integrity" must be more carefully construed to provide for at least some nexus with the federal funds or programs. Establishing such a requirement is consistent with the limits the Supreme Court has placed on the spending power. In particular, it gives meaningful content to the "relatedness" standards as applied to this statutory scheme.

Ibid (citations omitted).

This Court's one opinion dealing with the scope of Section 666 explicitly acknowledged the possibility that the Constitution limits the use of Section 666 in cases not implicating the integrity of federal programs and funds. In *Salinas*, *supra*, this Court rejected a criminal defendant's challenge to his Section 666 conviction. Salinas contended, among other things, that "the Government must prove the bribe in some way affected federal funds, for instance by diverting or misappropriating them, before the bribe violates § 666(a)(1)(B)." 118 S. Ct. at 473. This Court disagreed: "The prohibition [in Section 666] is not confined to a business or transaction which affects federal funds." *Ibid.* In so holding, however, this Court was careful to leave open the question whether – although the bribe itself need not directly "affect" federal funds to create Section 666 liability – the statute requires *some* "connection between a bribe and the expenditure of federal funds[.]" *Id.* at 474.

This Court also rejected Salinas' claim that applying Section 666 to his case was unconstitutional, but here too it was careful to limit its holding to the particular facts of Salinas' case: "Whatever might be said about [the statute's] application in other cases, the application of § 666(a)(1)(B) to Salinas did not extend federal power beyond its proper bounds." *Id.* at 475. As the Court emphasized several times, in Salinas' case, there *was* a "connection" between the bribes and the federal government's interest in the integrity of program funds, because "the bribe was related to the housing of a prisoner in facilities paid for in significant part by federal funds themselves" and "[t]he preferential treatment . . . was a threat to the integrity and proper operation of the federal program." *Ibid.* Thus, "*Salinas* may be read to indicate that the 'threat to the integrity and proper operation of [a] federal program' created by the corrupt activity is necessary to assure that the statute is not unconstitutionally applied." *United States v. Santopietro*, 166 F.3d 88, 93 (1999).[22]

C. The Court of Appeals' Decision Extends the Reach of Section 666 Beyond Constitutional Limits.

Article I of the Constitution gives Congress the power to promote the "general Welfare of the United States," U.S. Const. art. I, § 8, cl. 1, and to spend what it takes to do so.

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[22] *See also, e.g.*, *United States v. LaHue*, 998 F. Supp. at 1190 ("The Supreme Court [in *Salinas*] most certainly was not implying that section 666(b)'s jurisdictional clause should be read any more broadly than its language and purpose permit."); *United States v. Roberts*, 28 F. Supp. 2d 741, 745 (E.D.N.Y. 1998) ("*Salinas* . . . did not foreclose the possibility that there is an outer boundary beyond which the relationship between the bribe and the expenditure of federal funds is too remote to support § 666 jurisdiction.").

This is an expansive, sweeping grant of authority. But the Constitution also imposes meaningful limits on the federal government's ability to use the spending power as a vehicle for expanding federal criminal jurisdiction over traditional state crimes. These limits – like the Constitution's other "structural" provisions that balance the powers of separate sovereigns – protect individual liberty in criminal cases by constraining government no less than do the Fourth, Fifth, and Sixth Amendments to the Constitution.

The Court of Appeals' interpretation of Section 666(b) undermines these liberty-protecting limits. Section 666 protects the integrity of federal programs by regulating the activities of those who administer federal funds, but the Court of Appeals read the statute as, in effect, federalizing all corruption. Congress did not, and constitutionally could not, enact such a law.

If the Court of Appeals were correct, Section 666 would authorize federal prosecutions for bribes involving *any* organization that in *any* way receives in a year more than $10,000 from *any source* so long as those funds had at *any* point passed through the bailiwick of a federal program. But the "Constitution does not contemplate that federal regulatory power should tag along after federal money like a hungry dog." David E. Engdahl, "The Spending Power," 44 Duke L. J. 1, 92 (1994). This Court's *Dole* decision, specifically, and this Court's federalism jurisprudence more generally, require that the regulatory "strings" Congress attaches to federal money be at least "related" to the federal interest in the program or purpose that money is being spent to support. The Eleventh Circuit's interpretation of Section 666(b), and the Petitioner's Section 666 conviction, are inconsistent with this requirement.

CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeals should be reversed.

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